The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

April 30, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to enthusiastically recommend Robert E. Mang III for a clerkship in your chambers. Robert's intellect, passion for the law, work ethic, and poise make him a top tier candidate.

I was Robert's professor in Federal Courts and Administrative Law courses at The George Washington University Law School. Despite being two of the most difficult course offerings at the university due to the breadth and complexity of the subject-matter, Robert excelled. He asked refined questions that were premised on an underlying comprehension of the readings. He provided thoughtful and correct answers to my Socratic questioning. I was particularly impressed by how he was able to balance the rigor of studying the law with his busy intern schedule, and his service on the Federal Communications Law Journal, a journal for which he serves as the Executive Editor.

In my numerous conversations with Robert, I have encouraged him to clerk. He is genuinely interested in the law and the judicial experience. His legal training and judicial intern experience have fostered in him an unusually strong ability to read and apply statutory schemes in practical settings. His work ethic was evinced by his consistent preparedness in class. I believe that your investment in him as a law clerk would yield splendid results in terms of his timely and thoughtful contributions to your legal research and writing needs.

Robert has the temperament to capably serve as a clerk. He is humble, yet assertive and thoughtful, yet timely in his responsiveness. He is disciplined and consistent. Moreover, he is mature and exercises sound judgment with minimal need of supervision. If you have any questions about or would like to discuss my unreserved recommendation of Robert, please do not hesitate to contact me at (917) 562-9230 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Professorial Lecturer of Law

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Dear Judge Hanes:

I could tell you that Robert Mang, a student at the George Washington University Law School who has applied for a clerkship in Your Honor's chambers, is an outstanding writer, a sophisticated legal thinker, and a quick study. Based on my experience with him in the Consumer Protection Law class I teach at GW Law, those are truthful statements. (Yes, he received the highest grade.) But the same could be said for most applicants. Instead, please allow me to describe the characteristics that set him apart from his colleagues.

Robert already has in-depth work experience across the legal sector. He interned for an appellate judge, thrived in the pressure cooker of the SEC's Division of Enforcement, spent a semester with the D.C. Office of Human Rights, clerked at a well-known boutique law firm, and now works in the legal department of a union. Through equal parts initiative and fearlessness, he has seized every opportunity that going to school in Washington affords a law student. The result: He is a resourceful, no-drama candidate who adapts well to new surroundings.

Robert is enthusiastic about the law. I've been an adjunct faculty member for 36 years, and Robert demonstrates the qualities that make the job rewarding. He comes to class on time, fully prepared and sits in the front row. He hasn't just read the assigned cases. He's consulted other sources to get a broader perspective on the issue. An articulate speaker and a respectful listener, Robert is a consistent class volunteer whose contributions elevate the conversation.

Robert is a business owner. Why does that matter? Because he has successfully juggled a heavy course load, demanding jobs, and responsibilities as Executive Editor of the Federal Communications Law Journal while supporting himself in part as a professional photographer. Clearly, a decade of managing wedding parties, family groups, and corporate clients has prepared him for success as a law clerk and in the legal profession. He knows how to deliver on employer expectations effectively and efficiently, squeezing more than 24 hours out of a day.

Robert would arrive on Day One with his sleeves rolled up, ready to take on more responsibility than the typical law school graduate. Please call me at (202) 326-3081 if there is more I can tell you about this impressive clerkship candidate.

Very truly yours,

Lesley Fair
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RICO's broad reach may make it the best statute to fight health care fraud, but could a new Act go further?

This paper will examine how prosecutors can best protect consumers and their insurance companies from health care fraud. It is an important question because despite prosecutors' success – the Department of Justice ("DOJ") obtained over $3 billion in health care fraud judgments and settlements[1] in 2012 – health care fraud remains an enormous drain on both consumers' finances and the United States's economy as a whole. Some estimates indicate that as much as 10 percent of all health care costs may be fraudulent.[2] Prosecutors frequently rely on the False Claims Act, the Anti-Kickback Statute, and the Stark Self-Referral Law. While those statutes are often very potent tools, they are not without a glaring limitation. These laws only apply when the Federal Government is the victim of fraud but provide no protection to individual consumers or their insurance companies. Fortunately, while originally intended to protect Americans from mobsters, the Racketeer Influenced and Corrupt Organizations Act's ("RICO") broad reach is likely the best, and an equally potent tool, for both prosecutors and private plaintiffs to obtain justice where the federal government is not the victim. But as potent as RICO is, could a new statute which also has a mechanism for compensating whistleblowers actually be the best option?

The phrase "prosecutors" refers to numerous government actors. The Center for Medicare and Medicaid Services and the Office of Inspector General, both part of the U.S. Department of

[1] Michael Berry, Article, *Peeking Behind the Robes: A Not-So-Flattering Look at Medicare's Administrative Law Judges*, 12 IND. HEALTH L. REV. 65, 98 (2015) citing U.S. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: ANNUAL REPORT FOR FISCAL YEAR 2012 1 (2013), archived at http://perma.cc/S53L-X6TQ.
[2] Joseph Avanzato, David Wollin, Article, *Health Care Fraud: Potential Pitfalls for Health Care Providers*, 44-Jan R.I. B.J. 9, 9 (1996).

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Health and Human Services, as well as other government agencies, are actively involved in prosecutions often led by the Department of Justice – including Main Justice, the United States Attorney's Offices, the Federal Bureau of Investigation and others – to fight health care fraud. References to "prosecutors" will collectively refer to all of the federal government's enforcement activities in the health care fraud arena.

Health care fraud includes a wide variety of nefarious activity. The most common health care frauds include billing for an unnecessary procedure or prescribing an excessive dosage of medication, charging for procedures and tests not performed, and prescribing unsolicited and unnecessary medical equipment to elderly patients.[3] The False Claims Act[4] is a *qui tam* law. *Qui tam* laws allow relators – private plaintiffs – to file suit on behalf of the government and receive between 15-30 percent of any judgement or settlement ultimately obtained.

Qui tam provisions have a long history. The first known citation to a *qui tam* law was the 695 C.E. declaration of King Wihtred of Kent which prescribed a penalty of a half a freeman's earnings who worked on the Sabbath with half of that penalty going to an informer.[5] Throughout history, *qui tam* laws have allowed private plaintiffs to sue on behalf of the sovereign – in England, the United States, and elsewhere – and receive a financial incentive for doing so. Like the False Claims Act, *qui tam* laws usually incentivize private plaintiffs to inform on those defrauding the government. RICO, lacks a *qui tam* provision, but perhaps the combination of the

[3] Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 982-93 (2007).
[4] The False Claims Act, 31 U.S.C. § 3729, et seq.
[5] Qui Tam: The False Claims Act and Related Federal Statutes, Congressional Research Service, R40785 (August 6, 2009) available at https://fas.org/sgp/crs/misc/R40785.pdf *citing* Translated in Attenborough, THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (1963); described in Plucknett, EDWARD I AND CRIMINAL LAW 31-2 (1960), and Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 NORTH CAROLINA LAW REVIEW 539, 567 (2000).

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RICO framework with a new statute containing a *qui tam* provision would be the best tool for prosecutors?

The Anti-Kickback Act of 1986[6] prohibits receiving any money, gift, or thing of value in exchange for favorable treatment in making a service referral when the federal government is the payer. [7] What is commonly known as the Stark Self-Referral Law[8] prohibits a physician from marking referrals for health services to an entity with which he, she, or an immediate family member, has a financial relationship where Medicare or Medicaid is the payer unless an exception applies. All services are covered, including laboratory or diagnostic services; medical equipment; outpatient prescription drugs; speech, physical or occupational therapy; and inpatient or outpatient hospital services. [9] It is beyond the scope of this paper, but in certain circumstances, an exception allows a physician to make such a referral and still lawfully receive payment from Medicare or Medicaid.

In addition to potential loss of licensure, monetary penalties or jail time, violators of any of these laws can also receive the "civil death penalty[10]" which leaves the violator unable to directly or indirectly bill Medicare or Medicaid for services rendered.[11] The "death penalty" can apply when a health care provider "is convicted under any law, of fraud in connection with providing health care services or products, obstructing a health care fraud investigation, or the

[6] 41 U.S.C. § 51 *et. seq.*
[7] U.S. Dep't of Justice, Anti-Kickback Act of 1986, § 927 Criminal Resource Manual available at http;//www.justice.gov/archives/jm/criminal-resource-manual-927-anti-kickback-act-1986
[8] Social Security Act § 1877, 42 U.S.C. § 1395nn
[9] Centers for Medicare & Medicaid Services, Physician Self-Referral available at https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/index?redirect=/physicianselfreferral.
[10] Exclusion Statute, 42 U.S.C. § 1320a-7
[11] U.S. Department of Health & Human Services, Office of Inspector General, A Roadmap for New Physicians: Fraud & Abuse Laws available at https://oig.hhs.gov/compliance/physician-education/01laws.asp.

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unlawful manufacture or distribution of controlled substances." [12] A minimum five-year exclusion from participating in the Medicare or Medicaid programs is required for health care fraud convictions or convictions under any state or federal law for abuse or neglect of patients.[13] A criminal, versus civil, conviction under RICO, or for Mail, and/or Wire fraud, is a felony conviction which would likely result in a loss of licensure and accordingly the loss of the ability to participate in Medicare or Medicaid (and provide health care services) regardless of whether the Federal Government imposed the civil death penalty.

Federal prosecutors, aside from more directly related statutes, also commonly rely on the mail and wire fraud statutes, anti-money laundering laws, and laws protecting employee benefit plans to bring actions – especially when the federal government is not the victim. Despite the numerous statutes available to prosecutors, not all of which have been discussed in this paper, RICO actions with mail or wire fraud as the predicate offense may be the best statutory avenue for prosecuting health care fraud when the government is not the victim.

II. RICO is a powerful tool for prosecutors

The best avenue for prosecutors to bring enforcement actions against health care providers who have defrauded individual consumers and health insurance companies, but not the government or the Medicare/Medicaid programs, may be under the Racketeer Influenced and Corrupt Organizations ("RICO") statute. RICO was created in 1970 as Title IV of the Organized Crime Control Act. 18 U.S.C. §§ 1961-1968. Although the primary purpose of RICO is fighting organized crime, the Act offers tremendous flexibility. The diverse predicate acts which can form the basis of a RICO action can be grouped into five categories. First, violence; second,

[12] *Joseph Avanvato, David Wollin, Health Care Fraud: Potential Pitfalls for Health Care Providers,* 44-JAN. R.I B.J. *9, 12-13*; *see generally* 42 U.S.C. § 1320a-7(b)(1)-(3).
[13] *Id*., *see generally* 42 U.S.C. § 1320a-7(a),(c)(3)(A).

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illegal goods or services (e.g., drugs, gambling, prostitution, illegal immigration); third, corruption in labor or management relations; fourth, corruption in government; and fifth, fraud.[14] The type of racketeering activity prohibited by RICO includes both certain state-law offenses and the specific federal crimes provided as predicate offenses.[15] The two most compelling features of the RICO statute, for this purpose, are the 1) harsh penalties provided for by the statute and 2) the broad reach of the Act. Although not relevant for prosecutors' purposes, RICO provides for a private right of action. State law RICO causes of action are available in at least 33 states.[16]

A. Penalties Available under RICO

Aside from its breadth, the best reason for utilizing RICO are the harsh civil and criminal penalties provided under the statute by Congress. Criminal penalties encompass up to 20 years of prison time (or life, when permitted by the predicate offense), fines of up to $250,000 or up to twice the gain or loss, and criminal forfeiture of ill-gotten gains. [17] Defendants can also be ordered to pay restitution to the victims of the criminal enterprise, which is not always available under criminal statutes.[18] RICO's provision of restitution is critical, as it allows for the victims of health care fraud to be made whole – at least monetarily. The civil portion of RICO provides for treble damages, "any person injured in his business or property by reason of a violation of

[14] G. Robert Blakey, Article, *Time-Bars: RICO-Criminal and Civil-Federal And State*, 88 NORTE DAME L. REV. 1589, 1594 (2013) *citing* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 300-06 (1982).
[15] Victoria L. Safrana, Article, *RICO's Extraterritorial Reach: The Impact of European Community V. RJR Nabisco,* 4 STAN. J. COMPLEX LITIG. 47, 48 (2016) citing § 1961(1).
[16] *Introduction: RICO State by State: A Guide to Litigation Under the State Racketeering Statutes, Second Edition.* American Bar Association. Archived from the original on February 22, 2014. Available at https://web.archive.org/web/20140222015455/http:/www.americanbar.org/publications/gpsolo_ereport/2012/november_2012/introduction_rico_state_by_state.html Retrieved April 4, 2020 at 6:54 p.m.
[17] 18 U.S.C. § 1963.
[18] §§ 3556, 3663.

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section may sue therefor and shall recover threefold the damages he sustains"[19] (18 U.S.C. § 1964(c)) like the False Claims Act, and RICO is modeled after antitrust law. Although, not relevant for prosecutors' purposes, private plaintiffs no doubt find RICO's provision for awarding attorney fees appealing. The ability, however, to recover litigation expenses, like under the False Claims Act and other health care fraud statutes, is a relevant consideration for prosecutors.[20]

B. Broad Reach of RICO

RICO has long been recognized as a leading statute in fighting fraud, which is an area where other fraud deterrence statutes, outside of the False Claims Act and other health care fraud statutes, are scattered and often ineffective.[21] Ironically, this reflects Congress' concern in creating RICO. The statute's legislative history reveals that Congress "was concerned an overly narrow statute" would not reflect the legislative intent of providing a sledgehammer to fight organized crime.[22] Although RICO is frequently criticized as being overbroad, Congress' intention was just that, to create a broad tool for law enforcement. Senate debate focused on the statute being ineffective if not reaching crimes not always committed by organized criminals. [23] Both the American Civil Liberties Union and the DOJ raised concerns that statute was "too broad and would result in a large number of unintended applications." *Id.* Congress ultimately would adopt the DOJ's proposed "model [enumerating] the generic clauses of crimes covered." [24]

[19] Engstrom, 115 MICH. L. REV. at 667.
[20] *Id*.
[21] Nora F. Engstrom, Article, *Retaliatory RICO and The Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 645 (2017).
[22] Alexander M. Parker, Note, *Stretching RICO to the limit and beyond*, 45 DUKE L. J. 819, 831 (1996).
[23] *Id* at 831-832.
[24] *Id* citing S. REP. NO. 617, 91st Cong., 1st Sess. 121-22, 158 (1969).

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To explain RICO's elements in plain English, the key elements require[25]:

> (a) "a "person" who has received income from a "pattern of racketeering activity" cannot invest that income in an "enterprise,"
>
> (b) a "person" cannot get or keep control of an "enterprise" by a "pattern of racketeering;"
>
> (c) a "person" who is employed by or associated with an "enterprise" cannot "conduct" the affairs of the "enterprise" through a "pattern of racketeering;" and
>
> (d) a "person" cannot "conspire" to violate RICO."

Finally, the prohibited acts must fall within the domain of affecting interstate commerce.[26] In other words, it is unlawful to engage, or conspire to engage, in a pattern of racketeering as part of an on-going enterprise. These elements are "deceptively simple, however, [because] each concept is a term of art which carriers its own inherent requirements of particularity."[27]

The text of RICO requires courts to liberally construe RICO in achieving its goals.[28] Where RICO's meaning is clear, the statute undoubtedly controls but even where ambiguous, a Court is required to find a construction which allows the statute to achieve its purpose of providing greater remedies and new sanctions.[29] Courts must follow this command regardless of the nature of the suit.[30] It has even been used in landlord-tenant skirmishes, interchurch disputes, and domestic relations conflicts.[31] Leading corporations, including Boeing, General Motors, and

[25] Blakey, 88 NORTE DAME L. REV. at 1605-1614.
[26] Hoppe, 107 NW. U. L. REV. at 1382 citing 18 U.S.C. § 1962(a)-(d).
[27] *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).
[28] Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).
[29] Blakey, 88 NORTE DAME L. REV. at 1598.
[30] *Id.*
[31] *Id.* at 667.

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American Express have faced RICO suits.[32] Needless to say, this myriad of uses is not always well-received.

RICO requires continuing activity and "it is this factor of continuity plus relationship which combines to produce a pattern."[33] Any person, not just a mobster, is prohibited from using money derived from a racketeering enterprise by § 1962.*[34]* Most health care fraud involves a pattern of continuing fraud closely related to the provision of health care services in an ongoing enterprise. Caselaw shows each fraudulent act would not be viewed as single scheme but rather an ongoing fraudulent enterprise. Take *Northwestern Bell*, where the trial court rejected that logic in finding each allegation of bribery to be a single scheme rather the patten RICO required. [35] The Eighth Circuit affirmed but the Supreme Court reversed finding them to constitute a pattern because "they met the tests of "relatedness" and "continuity."'[36] It is the combination of "continuity" and "relationship" which creates the pattern.[37] A single patient is often the source of multiple instances of health care fraud. Health care fraudsters usually commit the same type of frauds against all their patients to form both relatedness and continuity throughout their organization.

RICO requires the "pattern of racketeering activity must somehow connect to "an enterprise" such as the operation of a hospital or a nursing home or other health care facility. [38] The Supreme Court also reads the text of the statute in the broadest possible manner despite repeated attempts

[32] *Id.* at 667-68.
[33] *Id.*
[34] *Sedima*, 473 U.S. at 495.
[35] Parker, 45 DUKE L. J. at 835 citing *H.J., Inc. v. Northwestern Bell Tel. Co.*, 648 F. Supp. 419, 420 (D. Minn. 1986).
[36] *Id.*
[37] Kevin J. Murphy, Note, *The Resurrection of the "Single Scheme" Exclusion to RICO's Pattern* Requirement, 88 NORTE DAME L. REV. 1991, 1994 (2013).
[38] Hoppe, 107 NW. U. L. REV. at 1380.

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by lower courts to reduce the breath of the enterprise requirement. [39] Under RICO, "an enterprise is broadly defined to encompass any individual or legal entity, or group of individuals in fact."[40] The term enterprise is explicitly defined in § 1961(4) as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[41] Notably, the statute uses the phrase "includes" to indicate the list is not exhaustive.[42]

However, despite all of the benefits from RICO's breadth and penalties discussed, the RICO statute, without a *qui tam* provision does not provide the same benefit of financial incentives available to relators under the False Claims Act. Perhaps a new statute, using the framework of RICO, along with a *qui tam* provision could be the tool prosecutors need?

III. RICO's Limitations Require a New Statute

Health Care Fraud is often discreet and requires sophisticated knowledge which presents a delicate need for information from someone involved in the fraud to detect the wrongdoing. Common examples of health care fraud include administering and billing for an excessive dosage of medication or an unnecessary procedure, charging for procedures and tests not performed, and prescribing unsolicited and unnecessary medical equipment to elderly patients. All of these required detailed, inside knowledge to detect. Often a medical determination must be made, such as whether the dose of medication provided was inappropriate, which both prosecutors and private plaintiffs may lack the expertise to make.

[39] Parker, 45 DUKE L. J. at 836; *see e.g. United States v. Turkette*, 452 U.S. 576 (1981).
[40] Safrana, 4 STAN. J. COMPLEX LITIG. at 48.
[41] Parker, 45 DUKE L. J. at 836 citing 18 U.S.C. § 1961(4) (1994).
[42] Hoppe, 107 NW. U. L. REV. at 1380 (2013) citing 18 U.S.C. § 1961(4).

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Qui tam plaintiffs, however, who are immersed in the medical community with some level of medical training have the necessary expertise. They are often better able to identify health care fraud than prosecutors or private plaintiffs.[43] A further challenge lies in the enormous number of claims submitted. That volume is often enough to prevent the detection of the vast amount of fraud occurring in Medicaid and Medicare claims. The assistance of *qui tam* plaintiffs is essential to overcome the volume.[44] Physicians operate with a high level of autonomy, professional curtesy, and presumption of trust and integrity making health care fraud all the more difficult to detect.[45]

Under a *qui tam* law like the False Claims Act, a relator receives 15 to 25 percent of the government's recovery. Frequently, relators are able to recover millions. Naturally, this is a powerful incentive. Aside from the financial incentive, the monetary reward mitigates relators' risk of retaliation and the harm to their careers that they likely will experience.[46]

The vast majority of health care providers are hardworking and extremely ethical, and they certainly should not be characterized in the same way as mobsters. That said, the situation is in some ways similar to the environment in which RICO was created. Fortunately, claims of intentional harm are at best very rare, but patient harm through neglect or willful blindness is sadly more commonplace. Patient welfare aside, the economic harm caused by health care fraud is unmistakable. Medical care is becoming more and more complex, health care costs continue to rise, and limitations imposed by private or public insurance limit profit margins. The temptation to commit health care fraud, perhaps unaware of the illegality of the action, is enormous. The

[43] Broderick, 107 COLUM. L. REV. at 982-93.
[44] *Id.* at 984
[45] *Id.*
[46] *Yerra v. Mercy Clinic Springfield Communities*, 536 S.W.3d 348 (Mo. App. S.D. 2017) (speaking to the dangers of retaliation whistleblowers face).

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data is unmistakable. Health care fraud judgements and settlements annually reach the billions while much of fraud is not reflected in that figure because it goes undetected, prosecutors are not always able to take action due to resource constraints, or the current application of existing laws creates enforcement gaps.

The legislative history of the False Claims Act and related statutes is even more complex than RICO's history. *Qui tam* provisions date back almost to the beginning of time and create the right to receive a handsome bounty for taking action on behalf of the King. In this country's history, major attention was given to this statutory tool first during the Civil War and then during the Cold War as a mechanism for restraining otherwise rampant fraud in government contracting.

Extending the reach of *qui tam* past fraud directly harming the sovereign is at best a radical proposition. But on the hand, many laws do just that under a different name. Antitrust laws, which RICO is modeled upon, allow private parties to recover treble damages through private enforcement of pro-competition laws to protect capitalism. It is not just abusing monopoly power or price fixing which expose wrongdoers to treble damages. Rather any harm to competition, in a way prohibited by antitrust laws, suffices. Health Care antitrust litigation is common, especially in rural areas. The Lanham Act allows companies to sue each other for treble damages in cases of trademark infringement, trademark dilution, and in some cases of false advertising.

The critical portion of a *qui tam* provisions is not the ability to bring action on behalf of the sovereign, the private right of action, but rather the ability for private plaintiffs to receive a bounty for, among other things, providing information to expose the fraud. However, like the False Claims Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act provides in § 922 that the U.S. Securities and Exchange Commission ("SEC") shall provide an award of

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between 10 to 30 percent of total monetary sanctions recovered by the SEC (or DOJ) when a whistleblower voluntarily provides original information which exposes a violation of federal securities laws.[47] This is commonly known as the whistleblower provision. It is similar to the relator provisions of the False Claims Act in terms of the bounty provided but does not allow the whistleblower to bring a lawsuit. Other securities laws provide a private of action when harmed by fraud but would not provide for a whistleblower payment.[48]

Arkansas law provides for a similar type of whistleblower bounty without an explicit *qui tam* provision.[49] The provision does have the limitation, however, of only applying to fraud against the State of Arkansas rather than fraud against anyone. It is time for Congress to act to remove the limitation of only providing financial incentives in cases brought by a government actor when the government has been harmed. Government resources are often limited but still dwarf what is available to the private sector, both in terms of manpower and subject matter expertise.

There is no question both the creation of RICO and the development of the False Claims Acts arose under very unique circumstances. Dodd Frank, too, provided much sought after financial regulatory reform in the wake of the financial crisis. Yet, the penalties available under both RICO and the False Claims Act are very similar. In addition to criminal penalties, both statutes provide for treble damages, attorney fees, and mechanisms to allow for private enforcement. RICO contains a traditional private right of action, whereas prosecutors have oversight over relator actions brought under the False Claims Act. Discussed above, a variety of

[47] U.S. Securities and Exchange Commission, Whistleblower Program available at https://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml; *see also* § 21(f) of the Securities Exchange Act of 1934, 17 C.F.R. 240, 249
[48] *See e.g.* § 10(b) of the Securities Exchange Act of 1934.
[49] Broderick, 107 COLUM. L. REV. 949, 957 *citing* Ark. Code Ann. §§ 20-77-902, -911(a) (1997).

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other existing laws allow for private enforcement of important public rights and/or mechanisms to provide financial incentives to whistleblowers.

Congress should act to create a new Omnibus Health Care Fraud statute which, while lacking an explicit *qui tam* provision, allows for whistleblowers to receive up to one-third of any recovery through a treble damages provision. The law would also allow recovery of attorney's fees but distinct from what portion a whistleblower may claim. Needless to say, the law would contain criminal penalties, when the government brings an action for fraud committed against individual consumers or private insurance companies, as well as a private right of action allowing for the recovery of treble damages.

Existing RICO laws, state laws and other federal statutes, as well as the False Claims Act, the Anti-Kickback Statute, and the Stark Self-Referral Law more frequently relied on by prosecutors to fight health care fraud are already most effective in policing fraud against the government. The gap in the laws for health care fraud not harming the government must be addressed. Until Congress acts, relying on RICO to address that gap is a powerful deterrent but without the expertise and insider knowledge of whistleblowers, RICO cannot be as effective as the False Claims Act.

Applicant Details

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Last Name	**Manuel**
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Applicant Education

BA/BS From	**United States Naval Academy**
Date of BA/BS	**May 2010**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 31, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Legal Ethics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Surface Navy Association** **United State Naval Academy Alumni Chapter: Greater Washington Area** **Veterans of Foreign Wars (VFW)**

Recommenders

Snee, David
davesnee@yahoo.com
(703) 980-1434
Tsoukala, Philomila
Philomila.Tsoukala@law.georgetown.edu
Hashimoto, Erica
eh502@georgetown.edu

References

Philomila Tsoukala: Professor, Georgetown University Law Center
Email: Philomila.Tsoukala@law.georgetown.edu; Phone: 617-331-8744

Erica Hashimoto: Director, Georgetown University Appellate Litigation Clinic
Email: eh502@georgetown.edu; Phone: 202-641-1130

Nicholas Sansone: Fellow, Georgetown University Appellate Litigation Clinic
Email: ns1218@georgetown.edu; Phone: 202-662-9555; 303-726-4548

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Meredith C. Manuel
601 L Street SE #237
Washington, D.C. 20003
June 2, 2021

Dear Judge:

I am a Navy veteran and recent graduate of the Georgetown University Law Center where I served as an executive editor on the *Georgetown Journal of Legal Ethics*. I am writing to apply for a position as a term law clerk in your chambers. I am currently studying for the bar exam in the District of Columbia and have accepted an offer from Steptoe & Johnson to return as an associate following my passing the bar.

My background has not only made me passionate about pursuing a career as an attorney but also proven that I have skills in legal analysis, communication, and collaboration that would make me an excellent candidate for your consideration. As a Navigator entrusted with tremendous responsibility, I collaborated with my team to uphold international law on the high seas in very stressful and high-profile situations while also regularly advising the Captain on sensitive matters to assist him in making the best decisions for his crew and ship. This is just one example of my ability to engage in legal analysis in an environment where intellectual flexibility and creativity were required. The ability to apply the law to facts concisely, and thoroughly, and thoughtfully, is highly relevant in any legal organization, but especially as a law clerk potentially working on a wide array of important matters on your behalf.

I am enclosing my resume, unofficial transcripts, and writing sample for your review. Letters of recommendation will be provided separately by my law school.

In addition, the following individuals have offered to serve as professional references on my behalf:

- Philomila Tsoukala: Professor, Georgetown University Law Center
  Email: Philomila.Tsoukala@law.georgetown.edu; Phone: 617-331-8744
- Erica Hashimoto: Director, Georgetown University Appellate Litigation Clinic
  Email: eh502@georgetown.edu; Phone: 202-641-1130
- Nicholas Sansone: Fellow, Georgetown University Appellate Litigation Clinic
  Email: ns1218@georgetown.edu; Phone: 202-662-9555; 303-726-4548

I thank you sincerely for your time and consideration and look forward to hearing from you.

Sincerely,

Meredith C. Manuel
Enclosures

MEREDITH C. MANUEL

601 L Street SE Apt. 237, Washington, D.C. 20003 • (808) 866-4441• mcm477@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — Washington, D.C.
Juris Doctor: GPA 3.39 — May 2021
Journal: Executive Editor, *Georgetown Journal of Legal Ethics*
Activities: Teaching Assistant, Professor Philomila Tsoukala's Family Law course (redesigned for online delivery & authored negotiation exercise implemented at Harvard Law School in the Spring of 2021)
Research Assistant, Georgetown University Law Library

UNITED STATES NAVAL WAR COLLEGE — Newport, RI
Masters of Arts, Defense and Strategic Studies — June 2019

UNITED STATES NAVAL ACADEMY — Annapolis, MD
Bachelors of Science, Political Science — May 2010

EXPERIENCE

STEPTOE & JOHNSON, LLC — Washington, D.C.
Law Clerk/Associate — Anticipated September 2021

APPELLATE LITIGATION CLINIC, GEORGETOWN UNIVERSITY LAW CENTER — Washington, D.C.
Student Attorney — August 2020 – May 2021

- Co-authored opening and reply brief in an ineffective assistance of counsel matter before the 4th Circuit Court of Appeals, *Crockett v. Clarke*, No. 19-6636. Served as principal drafter on availability of evidentiary hearing under AEDPA.

STEPTOE & JOHNSON, LLC — Washington, D.C.
Summer Associate — July 2020 – August 2020

- Conducted research and contributed to the drafting of a death row inmate's petition to the Supreme Court of Louisiana on the basis of various ineffective assistance of counsel claims.

U.S. DISTRICT COURT — Charleston, SC and El Paso, TX
Judicial Intern for the Honorable David Norton, District of South Carolina — July 2019 – August 2019

- Drafted an order responding to a union employer defendant's objection to the report and recommendation of the magistrate judge regarding necessary party joinder in a longshoreman civil rights case.

Judicial Intern for the Honorable Kathleen Cardone, Western District of Texas — June 2019 – July 2019

- Prepared an order responding to corporation's motion to dismiss based on lack of personal jurisdiction, the fiduciary shield doctrine, and an improperly joined defendant in accordance with existing 5th Circuit case law.
- Researched and prepared information on the application of the Texas Commission on Human Rights Act (TCHRA) and relevant case law on state voluntary waivers of sovereign immunity when removing to federal court.

UNITED STATES NAVY — Norfolk, VA; Pearl Harbor, HI; and Washington, D.C.
Auxiliaries Officer; Navigator; Senate Liaison Officer — May 2010 – August 2018

- Directed the ship's Navigation Department in conducting 30 harbor transits in the United States and abroad.
- Executed international Congressional Delegation (CODEL/STAFFDEL) travel to over 40 international locations.
- Communicated between congressional offices, Navy commands, and constituents regarding budget inquiries.

RESEARCH, AWARDS & INTERESTS

- David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 Geo. J. Legal Ethics (2020) (forthcoming). Coordinated German source collection and German grammar edits during COVID-19 pandemic.
- *Snitches Get Stitches: Ditching the Toleration Clause in Law School Honor Codes*, 33 GEO. J. LEGAL ETHICS 703 (2020). Voted best student submitted Note by journal peers. Presented an overview of law schools' honor and conduct codes, suggesting enabling peer confrontation is a preferred method to shape an ethical skill set amongst future attorneys.
- Interests: I enjoy photography, cycling, creative writing, and cooking. My Wire Fox Terrier, Daisy, never fails to keep life interesting. I also enjoy traveling to unique destinations. Before law school, I traveled to the arctic island of Svalbard, Norway.

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Meredith C. Manuel-Ruley
GUID: 821059537

Course Level: Juris Doctor

Transfer Credit:
American University
School Total: 29.00
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	128	08	Criminal Procedure Brent Newton	2.00	A-	7.34	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B-	10.68	
LAWJ	324	05	Maritime Law Jeffrey Lewis	2.00	B+	6.66	
LAWJ	418	05	Supreme Court Seminar Susan Bloch	3.00	A-	11.01	
LAWJ	514	05	Introduction to Scholarly Note Writing Jessica Wherry	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	11.00	35.69	3.24
Cumulative	41.00	11.00	35.69	3.24

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	134	05	Decedents' Estates Raymond O'Brien	4.00	P	0.00	
LAWJ	1460	05	Advanced Legal Practice: Judicial Opinions Susan McMahon	2.00	P	0.00	
LAWJ	165	05	Evidence Paul Rothstein	4.00	P	0.00	
LAWJ	173	09	Family Law I: Marriage and Divorce Philomila Tsoukala	3.00	P	0.00	
LAWJ	249	07	Jewish Law Seminar Simon Marciano	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	16.00	0.00	0.00	0.00
Annual	28.00	11.00	35.69	3.24
Cumulative	57.00	11.00	35.69	3.24

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	121	07	Corporations Charles Davidow	4.00	P	0.00	
LAWJ	276	09	Law and Economics Workshop Neel Sukhatme	2.00	A	8.00	
LAWJ	421	05	Federal Income Taxation Benjamin Leff	4.00	B+	13.32	
LAWJ	430	05	Recent Books on the Constitution Seminar Randy Barnett	2.00	A-	7.34	
LAWJ	504	06	Appellate Litigation Clinic Erica Hashimoto		NG		
LAWJ	504	82	~Lgl Res, Analysis & Writing Erica Hashimoto	2.00	IP	0.00	
LAWJ	504	83	~Professional Initiative Erica Hashimoto	1.00	IP	0.00	
LAWJ	504	84	~Oral Advocacy Erica Hashimoto	1.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	8.00	28.66	3.58
Cumulative	69.00	19.00	64.35	3.39

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1245	09	Trial Practice and Applied Evidence	3.00	P	0.00	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments Thomas Hardiman	1.00	P	0.00	
LAWJ	178	05	Federal Courts and the Federal System	3.00	P	0.00	
LAWJ	2028	09	Assisted Reproductive Technologies and the Law	2.00	A-	7.34	
LAWJ	3085	09	The Nuremberg Trials, the Doctors Trials	2.00	B+	6.66	
LAWJ	504	06	Appellate Litigation Clinic		NG		
LAWJ	504	82	~Legal Research, Analysis & Wr	4.00	B+	13.32	
LAWJ	504	83	~Professional Initiative	3.00	B+	9.99	
LAWJ	504	84	~Oral Advocacy	2.00	B+	6.66	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	20.00	13.00	43.97	3.38
Annual	32.00	21.00	72.63	3.46
Cumulative	89.00	32.00	108.32	3.39

End of Juris Doctor Record

DEPARTMENT OF THE NAVY
COMMANDING OFFICER
USS VICKSBURG (CG 69)
UNIT 100277 BOX 1
FPO AE 09592

1000
Ser 00/157
6 Apr 21

From: Commanding Officer, USS *Vicksburg* (CG 69)

Subj: RECOMMENDATION FOR LAW CLERK POSITION ICO MEREDITH C. MANUEL

1. I am writing to recommend and strongly endorse Meredith C. Manuel for a law clerk position in your chambers. As Meredith's former Commanding Officer, I believe the skills she demonstrated while serving as the ship's Navigator are similar to those required of a law clerk. She has my utmost trust and confidence. She would be a natural fit for the law clerk role and an invaluable asset to your team.

2. I have known Meredith since 2013 when she served as my Navigator on the Guided Missile Destroyer USS *Hopper* (DDG 70), based in Pearl Harbor, Hawaii. While serving in this role, she also served as a Department Head managing the Personnel, Administration, Navigation, and Medical divisions. Additionally she served as the ship's Legal Officer; a collateral duty only given to the most capable of officers. Following this assignment, Meredith was hand selected to serve as a Senate Liaison Officer in the Navy's Office of Legislative Affairs on Capitol Hill. Always eager to tackle difficult assignments with a focus on impeccable ethical standards, it was no surprise to learn Meredith separated from active duty service in 2018 to attend law school full time where she continues to thrive.

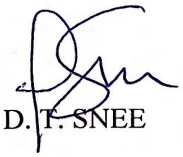
3. On a warship, the Navigator serves as the Captain's primary advisor to safely navigate the ship. The Navigator is responsible for maintaining an accurate plot of the ship's position by celestial, visual, or electronic means at all times giving careful attention to the ship's course and the depth of the water when approaching land or shoal waters. The Navigator is also required to maintain precise accountability and accuracy of the ship's official log and record books. During special sea and anchoring evolutions, the Navigator stands within feet of the Captain to provide critical recommendations. Meredith performed these duties better than any Navigator I have ever served with. Specifically she planned and executed over 50,000 nautical miles of transit for Hawaii to the Arabian Gulf and back in support of USS *Hopper*'s 2013-2014 Ballistic Missile Defense Deployment. She planned, executed, and provided superb guidance to over 20 restricted water transits in both U. S. and foreign ports to include Pearl Harbor, Guam, Straits of Malacca, Singapore, Strait of Hormuz, Bahrain, Dubai, and Thailand. I relied heavily on Meredith and her team's research to make safe and timely decisions for the ship.

4. As I understand the duties of a law clerk, like Navigators, they undertake painstaking preparations in order to advise on how to rule in any particular case by conducting extensive legal research to understand existing jurisdiction. They also may, in some cases, serve as advisors during hearings or trials and need to be quick and confident in advising on procedural or substantive matters. After interning with two federal judges in the summer of 2019, Meredith

described the role of legal clerk as being like that of a Navigator, but "in slow motion." I am inclined to agree – I believe that serving as a law clerk is an obvious extension of the skills Meredith has already mastered in her time in the Navy as a Navigator.

5. What's more, Meredith's navigation skills were not the only indicators of her capabilities. In her tenure, she demonstrated strong leadership acumen by mentoring fellow Junior Officers in obtaining their qualifications and provided guidance and instructions to those deck officers in-training in my absence. Meredith also revised and improved every Navy instruction under her cognizance to include Burial-At-Sea, Navigation, Electronic and Paper Chart Allowances, Marine-Mammal and Environmental Protection, and Honors and Ceremonies ensuring USS *Hopper*'s compliance with ever-evolving Navy policies and procedures. This list demonstrates the variety of topics that fell under Meredith's influence, but also speaks volumes to her effective technical writing skills that she has continued to build upon at Georgetown Law. In addition Meredith served as my hand-chosen Legal Officer. When UCMJ Article 15 procedures were conducted and Non-Judicial Punishment awarded, Meredith ensured judicious investigations and accurate administrative processing. She offered sound advice to me in regards to legal matters and showed great maturity and understanding in doing so.

6. Meredith is purpose-driven, compassionate, and insightful individual who embodies unwavering commitment to self-improvement and humility. She has encountered and prevailed against many challenges in her Navy career which has given her grace, maturity, and an informed worldview that is likely not often found in recent law school graduates. As long-term visionary, she also understands the gravity of her responsibilities as a servant of justice in your chambers. She is uniquely qualified to continue to serve our Nation as law clerk. She fulfilled her role as Navigator under my purview with distinction, honor, and integrity in high stress evolutions when speed and accuracy was of the essence. I am confident that she will do the same in your chambers.



D. T. SNEE

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 08, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Meredith Manuel for a position in your chambers with the utmost enthusiasm. She is one of the smartest, most intellectually curious, diligent and entrepreneurial students I have ever had in my fourteen years in academia. Please allow me to introduce myself and elaborate on these points.

I am a Professor of Law at Georgetown University Law Center, teaching Family Law, European Union Law and a jurisprudential course for 1Ls called Legal Justice. I write mostly in the fields of Family Law and Comparative Family Law and I am the co-author of a major Family Law casebook (Judith Areen et al., Family Law: Cases and Materials, 7th edition). I hold a LL.M. ('02 degree waived) and a S.J.D. ('08) from HLS. I have been teaching law for fourteen years.
Ms. Manuel was my student in Family Law during the Spring Semester of 2020. I then hired her as my research and teaching assistant for my Family law course in the Fall of 2020. During this past year, I have come to know her well, not only as a student, but also as one of the most capable and entrepreneurial research and teaching assistants I have ever had. Let me elaborate more on this experience and my knowledge of Ms. Manuel's capacities and character.
Due to Covid-19, our faculty went online in the middle of the semester and switched to a pass/fail system of grading. Ms. Manuel got a passing grade but more importantly, distinguished herself throughout the semester, through her diligent preparation, astute questions and rich life experience, which she brought to the classroom. She would have no doubt gotten top grades had we been allowed to give actual grades that semester. I was in fact so impressed with her performance that I asked Ms. Manuel to work with me during the summer as my research assistant, in order to help me reorganize my Family law course to make it more compatible with online teaching. We worked together intensively through the summer and Ms. Manuel continued to impress me with her smarts and her outstanding organizational skills and work ethic. Perhaps I should have not been surprised at her meticulousness and rigor, given that she had formerly served as navigator for a US Navy submarine. She managed tight deadlines and intense workload incredibly well and made invaluable contributions and suggestions to my course.

Ms. Manuel's organizational skills and meticulousness are coupled with an almost limitless fountain of creativity. I charged Ms. Manuel with imagining a hypothetical couple in a hypothetical divorce scenario in order to help me draft my usual divorce negotiation exercise for the semester. I was expecting a bare bones response. Instead, I got the most detailed, well-thought-out and planned hypothetical, complete with charts about potential outcomes that students may be negotiating, a grading rubric and interesting background readings to boot. This is by far the most outstanding performance yet from a research assistant and well surpasses the level of capacity expected from a law student. She produced all that under time pressure and while keeping me organized and on my toes at the same time. The exercise also required considerable legal research and writing skills. Ms. Manuel exhibited the highest level of ability in both these categories.

Ms. Manuel served as a teaching monitor for my zoom class in the fall of 2020. She was present in all my class sessions and made sure that I didn't miss any technical issues as well as substantive disagreements and problems that may have come up in the chat function of zoom that I may have missed due to focusing on teaching. Her help there was invaluable and of the utmost professionalism as well. On a couple of occasions, she spotted group dynamics that were problematic and needed some intervention, alerting me through private message and contacting me after class to discuss. Towards the end of the semester, Ms. Manuel even managed three sessions with invited guest speakers, when I was unable to attend because of the early arrival of my baby daughter. I watched the class recordings and her conducting of the classroom discussion was impeccable, more appropriate for a seasoned academic than for a third-year law student.

Ms. Manuel has an inquisitive mind and is infinitely curious. She is a delight to work with and her natural ambition and grittiness make her an outstanding person in any workplace setting. She has excellent research and writing skills and plenty of useful initiative. She has been an outstanding team player and I expect she will fit in well in any professional setting-I repeat: she lived in a submarine for months…Her career ambitions are evident from her CV, whose details I will not repeat here. I am confident she is on her way to a distinguished legal career and a clerkship in your chambers is, I believe, an excellent fit both ways.

Philomila Tsoukala - Philomila.Tsoukala@law.georgetown.edu

Please let me know if you have any further questions. I am on leave in the spring semester but will be happy to respond to any inquiries about Ms. Manuel's candidacy.

Best,
Philomila Tsoukala

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 08, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

We write to recommend Meredith Manuel for a judicial clerkship in your chambers. Meredith is a highly tenacious lawyer-in-training who thrives on pushing herself academically and experientially. Meredith's grit and determination are evident from her lengthy run of military service and her unflagging commitment to taking full advantage of the educational opportunities that earlier generations of her family did not enjoy. Over the course of our year with Meredith, we have seen her confidence and aptitude grow as a result of her considerable efforts, and we know she will carry her earnest, steady diligence with her into chambers.

We have the pleasure of teaching Meredith in our legal clinic, the Appellate Litigation Program, during the current 2020–2021 academic year. A two-semester clinic for third-year law students, the clinic accepts appointments to appellate cases from the United States Courts of Appeals for the D.C., Fourth, and Eleventh Circuits. Paired in teams, students participate in all aspects of appellate litigation, including litigation strategy, case research, brief drafting, and oral argument. Alongside the casework, students participate in a weekly seminar to develop their advocacy skills. Because we closely supervise students throughout their work, we learn a lot about their work habits and the quality of the work they are capable of producing.

During her time in the clinic, Meredith has been working on a Fourth Circuit habeas appeal that raises an ineffective assistance of trial counsel claim. In terms of the volume of material to master, this is one of the most challenging cases the clinic has taken on this year. The case reached the Fourth Circuit only after two multi-day jury trials in Virginia state court, direct appellate proceedings in Virginia's courts, a full round of state postconviction proceedings based on a 50-page habeas petition with 433 exhibits, and federal district court proceedings based on a 130-page habeas petition raising seven distinct legal claims (with an eighth added in a subsequent amendment). Beyond the case's factual and procedural complexity, the legal issues require a sophisticated understanding of both the relevant Sixth Amendment precedent and the nuances of the Antiterrorism and Effective Death Penalty Act (AEDPA).

Meredith signed up for this project in large part because she was attracted by its difficulty and knew it would afford her ample opportunity to develop as a litigator. As she hoped, she grew considerably in briefing the case. Meredith had not previously encountered AEDPA, and the project required her to take a head-first dive into a notoriously difficult thicket of case law involving the statute's application and, in particular, the circumstances under which AEDPA permits an evidentiary hearing in federal habeas proceedings. In addition to getting up to speed on the black-letter law, Meredith simultaneously needed to think through how it might apply to our case's voluminous record. In the two months between being assigned to the case and submitting the opening brief to the Fourth Circuit, Meredith worked steadily to firm up her grasp on both the law and the case's lengthy history. This process showcased Meredith's consistent drive and motivation. During the initial research stage, she was always willing to dive back into the case law to explore additional wrinkles and further refine her understanding of the tricky precedential landscape. And as she moved into drafting, Meredith continued to approach her work with steady deliberation, turning out draft after draft—sometimes on very tight turnarounds—as she worked to develop an ever clearer and more persuasive version of her argument. Meredith (like most other students in the clinic) was new to the role of advocate, and so her early drafts tended to resemble bench memos that neutrally stated the law and modestly suggested a disposition. But by the end of the process, Meredith had grown into her advocacy role, focusing more directly on her legal conclusions and thinking of the brief as an opportunity to give the Court a logical roadmap as to why those conclusions followed from the relevant facts and governing law.

The growth Meredith exhibited during the opening brief continued—and indeed accelerated—when it came time for her to work on the reply brief. The reply brief's tight three-week turnaround time poses a challenge for any new litigator, and all the more so in a case as complex as this one. But Meredith was prepared. During the time we were waiting for the State's brief, she had studiously reviewed the case's extensive record and begun to anticipate the arguments the State was likely to make. As a result, she was able to set immediately to drafting—and from her very first draft, it was clear that she had retained the strengths she had developed while writing the opening brief. Her writing was clearer and less tentative and, as with the opening brief, she used the revision process very fruitfully to strengthen the logic links between the various components of her argument.

Erica Hashimoto - eh502@georgetown.edu

Throughout her work on the case, Meredith proved to be a supportive and reliable teammate as well. Because there was an inevitable degree of overlap between the issues she and her partner were working on, it became especially important toward the end of the drafting process to harmonize the various sections of the brief to avoid redundancy and ensure tonal consistency. Meredith and her teammate easily developed a strong synergy, communicating effectively and proactively with one another throughout the give-and-take of the revision process. The bond Meredith and her teammate developed was undoubtedly due in no small part to Meredith's openness and forthright communication style. Put simply, Meredith speaks her mind. In some people, that quality can shade into tactlessness or a confrontational attitude. Not so with Meredith. Meredith's directness stems entirely from a refreshing sense of honest—and even humble—transparency. She is always willing to speak up, generously and respectfully, when she is wrestling with a question about the law or a doubt about the wisdom of a particular approach. And just as important, she is always eager then to listen to her teammates and absorb their perspectives.

Meredith's hard work, steady diligence, and forthrightness have thus served her well in the clinic. But they are also reflective of a powerful drive that has motored Meredith throughout her professional life. The eight years Meredith spent in the U.S. Navy immediately leap off her resume and set her apart from her peers. But equally impressive, and more likely to risk going overlooked, is how hard Meredith had to fight to arrive in law school at all. Meredith's grandfather was a truck driver from western Virginia with a seventh-grade education, and her mother was the first person in her family to graduate from college. Meredith has mentioned that she has sometimes been reluctant to mention her family history or her upbringing in Appalachia because, in her words, she "considered it, on some level, shameful" and she "struggled with whether perspective matters." But as she has begun to gain confidence as a legal professional, she has grown increasingly committed to "really try to bridge divide" between the community she comes from and the legal elite she is preparing to enter. It has been inspiring to join Meredith on part of her journey of self-realization, and we are confident you will feel the same way.

Meredith is a fascinating person with an earnest commitment to her work, her colleagues, and her community. We know that she would bring her absolute all to your chambers. Please feel free to contact us if you need any additional information. Thank you.

Best regards,

Erica J. Hashimoto

Professor of Law and Program Director

Nicolas Sansone

Supervising Attorney and Clinical Teaching Fellow

Snitches Get Stitches: Ditching the Toleration Clause in Law School Honor Codes

MEREDITH C. MANUEL*

> It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.
>
> – Sherlock Holmes, *A Scandal in Bohemia*

INTRODUCTION

Imagine you are a brand new first-year law student. During your law school's orientation, you were briefed on your school's academic honesty policy. You learned about how honor offenses at your school included both receiving unauthorized assistance on assignments and plagiarizing the work of others without providing appropriate citations. This seemed relatively straightforward to you. But you also learned that honor offenses extended to conduct violations, such as the audio recording of classes. You shifted in your seat uncomfortably when the Dean told you that not reporting an honor offense was itself an honor offense. You are not too concerned because you plan to stay focused on your studies and not be caught up in any kind of cheating. But, alas, you are not that lucky.

In your first Contracts class, you notice a student sitting next to you press record on their cell phone and place it on the desk. You are relatively certain that this is an honor violation. You also surmise that if you said something to your fellow student, she might thank you for the heads up, stop the recording, and explain that she was just hoping to review the audio after class to review. You then realize that if you say anything at all, your words will confirm that you saw a violation—and in not reporting it you are committing an honor offense yourself. You search for the email address you were told to report violations to and begin to draft an email. You hate the idea of being a "snitch" on the first day of class. And you know you could just as easily stop your classmate from committing what is probably one of the less-obvious offenses. Should you just stay quiet? What, then, are you to do?

Now imagine that at the end of the semester, instead of witnessing a student recording on the first day of class, you witness a fellow student share a news article in a group chat on which your first year Civil Procedure Exam's fact pattern is based. You know that some of your classmates have yet to take the exam due to personal reasons. What should you do here? Is your answer different from the hypothetical presented above? Why?

* J.D., Georgetown University Law Center (expected May 2021); M.A., United States Naval War College (2019); B.S., United States Naval Academy (2010) The author would like to thank her mother and the journal editorial staff.

Current and former law students may be familiar with this stressful culture of fear that results from an academic environment that requires students to report violations of an honor or conduct code or be in violation of it themselves. The unique task of the law school is to create an environment that balances the training of students with the demanding realities of their eventual practice as attorneys which may include addressing difficult ethical questions. Law school honor and conduct codes play an integral part in this endeavor. Thus, it becomes critical to ask, how should law schools cultivate tomorrow's lawyers and what role does the school's honor or conduct code play? Should law schools emphasize rigidity and a culture of reporting? Or should they emphasize student ownership, peer leadership, and place their trust in the agency of individual students and faculty?

In Part I this Note will first provide a brief overview of the relevant distinctions between honor codes, conduct codes, and codes of professional ethics. Part II will then narrow the discussion to analyze the debate surrounding a school's use of the "toleration clause" which mandates student reporting of observed violations, with emphasis on the United States Naval Academy as a relevant example. Part III will provide an overview of modern law school approaches at the top one hundred schools in the nation. Finally, Part IV will argue that more law schools should remove the toleration clause to better prepare future attorneys for the reality of their eventual practice of law in their respective jurisdictions.

The conclusions and recommendations made in this Note are a result of obtaining and analyzing the honor codes of the U.S. News and World Report's top one hundred law schools. In addition, traditional legal research involving secondary source material and, in some instances, relevant case law is used. This data was compiled in the Fall of 2019. It includes both the 1987[1] and 2019[2] U.S. News and World Report law school rankings and bar passage rates, along with the location of the school in accordance with the United States Census geographical regions.[3] A school's classification as faith-based was made based upon a review of the school's history provided

1. *America's Best Colleges And Professional Schools: An exclusive survey by the editors of U.S. News & World Report*, U.S. NEWS & WORLD REPORT, 1987, at 32–34 [hereinafter *1987 Rankings*]. These rankings are reproduced in the appendix.

2. *Best Law Schools: Ranked in 2019*, U.S. NEWS & WORLD REPORT, https://web.archive.org/web/20191210045418/https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings [https://perma.cc/X2GD-3FP6] (last visited April 20, 2020) [hereinafter *2019 Rankings*]. These rankings are reproduced in the appendix.

3. U.S. Census Bureau, *Census Regions and Divisions of the United States*, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [http://perma.cc/X89S-TMZR] (last visited Jan. 6, 2020); *see also* United States Census Bureau, *Regions and Divisions*, https://www.census.gov/history/www/programs/geography/regions_and_divisions.html [http://perma.cc/BH87-2K6E] (last visited Jan. 6, 2020) (describing renaming of North Central Region as Midwest).

on its website. Great care was taken to ensure the integrity of this data set, but any errors are entirely the author's own.

I. STANDARDS OR RULES?

Skepticism of the legal profession has a long history. Ever since Dick the Butcher uttered "Let's kill all the lawyers" in Shakespeare's *Henry VI*,[4] lawyers have borne the brunt of many jokes.[5] The Pew Research Center's 2013 survey ranked lawyers last of ten professions with respect to the public perception of "contributions to society" as compared to military officers, who ranked at the top of the list.[6] Over time, attorney organizations have developed their own policing mechanisms to uphold the integrity of the profession.[7] Law schools, in turn, have drafted their own standards to prepare their attorneys-in-training. Just as the *Model Rules of Professional Conduct* are a "cooperative undertaking" in coordinating the conduct of the profession,[8] law school honor codes seek to standardize conceptions of honor amongst the student body.[9] Honor, then, may be defined as "an ethical system in which one's outward presentation as a worthy person is confirmed or challenged by others in the relevant social group, who confer honor on persons exhibiting valued characteristics and shame on those who deviate

4. WILLIAM SHAKESPEARE, HENRY VI, act 4, sc. 2.

5. Arguably, this line was not a critique, but rather a compliment. *See* Debbie Vogel, Letter to the Editor, 'Kill the Lawyers,' A Line Misinterpreted, N.Y. TIMES, June 17, 1990, at LI 12, https://www.nytimes.com/1990/06/17/nyregion/l-kill-the-lawyers-a-line-misinterpreted-599990.html [http://perma.cc/KBX7-XG7W] ("Dick the Butcher was a follower of the rebel Jack Cade, who thought that if he disturbed law and order, he could become king. Shakespeare meant it as a compliment to attorneys and judges who instill justice in society.").

6. *Public Esteem for Military Still High*, PEW RESEARCH CENTER (2013), http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/ [http://perma.cc/ZDG3-U92Y] [hereinafter *Pew Research Survey*].

7. *See generally* Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAWYER 484, 496–98 (1932) (describing origins of the Canons of Professional Ethics of the American Bar Association).

8. MICHAEL DAVIS, PROFESSION, CODE, AND ETHICS 51 (2002) ("A profession is . . . a cooperative undertaking. In exchange for putting herself under an obligation to do as those in her profession are doing, each member of the profession receives the benefits of being identified as a member of that profession.").

9. K.C. Carlos, *The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes,* 65 UMKC L. REV. 937, 958 (1997) ("First and foremost, this body should have the responsibility of promoting the values of the honor code to the student body."); *see also* Nicola Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: a Necessary Step Towards Professionalism?*, 634 NEB. L. REV. 634, 645 (2015) ("In addition to pedagogical acquisition, standards of professional conduct should be instilled: standards which may very well be substantially influenced by the models of those persons or institutions from whom professional competence is acquired.").

from prescribed standards."[10] The imposition of broad moral constructs upon a diverse student body coming from myriad cultural backgrounds is a challenging task. Yet, this is the task of the law school—indeed, of any institution of higher learning.

Because the concept of honor is broad and may be applied to any number of potentially unethical situations, some suggest that true honor codes "tend to be codified in very general terms, or not codified at all."[11] Ethical codes or codes of ethics, on the other hand, are somewhat different from honor codes because while they reflect broad standards of morality, they also establish clear-cut guidelines or rules for conduct in a variety of situations.[12] For example, the legal profession's adoption of the *Model Rules* as a replacement of the *Model Code* "represented a further step in the movement of the code governing the legal profession from standards to rules."[13] In comparison, law school honor and conduct codes generally "seem to reflect a more particular focus on specific rules regulating the behavior of law students, without regard to the informal community norms that are at the center of honor systems, or the moral precepts that are at the center of ethics codes."[14] Some have argued that for this reason, law school honor codes are more accurately described as conduct codes because "the vast majority of law school codes consist primarily of a large number of detailed regulatory provisions covering a wide range of possible student behaviors [rather than] emphasis on broad moral precepts."[15]

It is not surprising, then, that a variety of approaches are employed by the top one hundred law schools in the United States. Some schools offer broad ethical canons[16] in their respective codes while others meticulously list various offenses and bear a striking resemblance to the criminal law's *Model Penal Code*.[17] This section will provide an overview of the purposes

10. W. Bradley Wendel, *Regulation of lawyers without the code, the rules, or the restatement: Or, what do honor and shame have to do with civil discovery practice?*, 71 FORDHAM LAW REV. 1567, 1577–78 (2003).
11. Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803, 808 (2005).
12. *Id.* at 809; s*ee also* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching In Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 45 (1995) (stating that the "term 'ethics' dropped out of the title, to be replaced by the more technical sounding 'professional responsibility'" which represented a "de-moralization of the ethics rules").
13. Berenson, *supra* note 11, at 823.
14. *Id.* at 809.
15. *Id.* at 809–10.
16. For example, Stanford University's honor code was written by students in 1921, is merely a paragraph long, and contains broad ethical guidelines for students and faculty. *See* Stanford University Office of Community Standards & Student Affairs, *Honor Code*, https://communitystandards.stanford.edu/policies-and-guidance/honor-code [http://perma.cc/88CF-UFQE] (last visited Jan. 7, 2020) [hereinafter *Stanford Honor Code*].
17. The Model Penal Code levels of intent, for example, are even codified in the honor codes at the University of Maryland and the University of San Diego. *See* University of Maryland Francis King School of Law, Student Honor Code,

and critiques of existing law school honor codes and examine duties to report and peer counseling as they exist currently in the legal profession. While there are a wide variety of approaches by law schools in governing student conduct in the form of honor codes, conduct codes, academic honesty policies, etc., such codes will be referred to as honor codes for the purposes of consistency throughout this analysis.

A. PURPOSES & CRITIQUES OF EXISTING LAW SCHOOL HONOR CODES

The American Bar Association Standards for Law School Accreditation provide that the dean and faculty of the law school have the primary responsibility for "planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards."[18] Honor codes and academic honesty policies, therefore, are employed by law school administrations to educate, regulate, and prepare students who will one day be admitted to the bar. Today, honor codes often serve this role in conjunction with an ethics course taken during law school that is required by many state bars,[19] but this is a relatively new concept in the world of legal academia.

The growth in ethics education that has necessitated new ethics curricula has been referred to as a response to a "clamor for reform" motivated by new pedagogical developments in experiential education, the evolving nature of the attorney's role, decreased job growth in the legal sector, rising attendance cost at the nation's law schools, and the need for so-called "practice ready" graduates increasingly entering solo and smaller-sized practices.[20] Along with academic requirements, career counseling,

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https://www.law.umaryland.edu/Policy-Directory/Academic-Standards-and-Honor-Code-Policies/Honor-Code/ [http://perma.cc/UBD4-GNXC] (last visited Jan. 7, 2020); University of San Diego, *Honor Code*, https://www.sandiego.edu/law/current/student-handbook/honor-code.php [http://perma.cc/8AST-TNAX] (last visited Jan. 7, 2020). *But see* Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969) ("It is not sound to draw an analogy between student discipline and criminal procedure.").

18. American Bar Association, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2019–2020 9 (2019); *see also* Nicola Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M.L. REV. 33, 38 (2012) (suggesting how the ABA may function as a "source of pressure to encourage and foster professionalism education in law schools").

19. *See* Denise Platfoot Lacey, *Embedding Professionalism into Legal Education*, 18 J.L. BUS. ETH. 41, 41–48 (2012). *But see* Alan Lerner, *Using our Brains: What Cognitive Science and Social Psychology Teach us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 650 (2005) (asserting that "learning the rules of professional conduct does not necessarily lead to eventual ethical practice"); Helia Hull, *Legal Ethics for the Millennials: Avoiding the Compromise of Integrity*, 80 UMKC L. REV. 271, 284 (2011) (suggesting that it is "unclear" how much else is taken from the ethics course).

20. Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required*, 43 WASH. U.J.L. & POL'Y 11, 11–12 (2013); *see also* Miriam R.

clinics, experiential learning, and extracurricular activities, honor codes are just one of many tools employed by school administrations in their quest of producing competent attorneys.[21] Codes themselves, however, serve many purposes and interact with nearly every facet of the curriculum offered at any law school.

The educative purpose of law school honor codes is arguably their most important function, as they prepare students for how to ethically navigate their future practice of law.[22] Often times, honor codes are drafted with the ABA's *Model Rules* or the relevant rules of professional conduct from the law school's serving jurisdiction in mind.[23] Codes also ordinarily provide for formal proceedings in which students may practice skills relevant to the legal profession by serving in an investigatory, prosecutorial, or defense counsel role in processing of an alleged violation.[24]

The regulation of student conduct, however, is also a critical function of law school honor codes. Codes define the rules by which each student must abide in the course of earning their degree. In doing so, they establish the efficient system of "fair academic competition" that is essential to the

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Albert & Jennifer A. Gundlach, *Bridging the Gap: How Introducing Ethical Skills Exercises will Enrich Learning in First-Year Courses*, 5 DREXEL L. REV. 165, 172–86 (2012); Deborah Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 448 (2013); Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICHIGAN L. REV. 34, 67 (1992). *But see* Alice Woolley, *Legal Education Reform and the Good Lawyer*, 51 ALTA L. REV. 801, 805 (2014) (arguing that existing approaches do not help students "develop the attributes and competencies necessary for ethical professional practice"); Hull, *supra* note 19 at 285 (suggesting "schools need to integrate legal ethics lessons into courses throughout the curriculum" rather than just offering one mandated ethics course); Martin J. Katz, *Teaching Professional Identity*, 42 COLO. LAW. 45, 45–48 (2013) (recommending increased experiential education in law schools); KIM ECONOMIDES, ETHICAL CHALLENGES TO LEGAL EDUCATION & CONDUCT 107 (1998) (describing how "attempts to encourage or require instruction in legal ethics *simpliciter* have been largely unavailing" and offering the Canadian model, which does not require professional training in ethics while in law school, in contrast).

21. *But see* Hull, *supra* note 19, at 275 (asserting that millennial law students are less likely to report cheating despite presence of an honor code); *see also* Steven C. Bennett, *When Will Law School Change ?*, 89 NEB. L. REV. 87, 97–99 (2010) (arguing that in order to become "fully-functioning and ethical lawyers, students must develop ethical sensitivity" and "make a commitment to ethical practices during the course of law school").

22. Berenson, *supra* note 11, at 825 (arguing that similar to the goals of the *Model Rules*, regulation is the most important function of the student honor code, followed by education and then aspirational objectives). *But see* Raymond M. Ripple, *Learning Outside The Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J. L. ETHICS PUBLIC POLICY 359, 369 (2001) (noting that the *Model Rules* themselves were "not seen as aspirational in nature").

23. Berenson, *supra* note 11, at 821 ("Indeed, a number of law school conduct codes specifically incorporate the applicable professional code, making those standards binding on law students for purposes of academic discipline.").

24. *Id.* at 824–25.

law school's primary role of educating future lawyers.[25] To truly be effective, therefore, an honor code must "ensur[e] the integrity of testing and other evaluative tools" in order to "have the effect of enhancing some of the more salutary learning goals of the law school[.]"[26]

The regulatory and educative purposes of honor codes may be complemented by the school's desire to maintain its public image. For example, some scholars argue that both increases in student misconduct and the school's aim to avoid the appearance of impropriety amongst the general public play major roles in the drafting or enforcement of a school's honor code.[27] Additionally, the function of honor codes has evolved to include a school's relevant bar reporting requirements.[28] For example, academic misconduct is addressed in the *Code of Recommended Standards for Bar Examiners* as one of thirteen recommended assessment points in the character and fitness evaluation.[29] Furthermore, most states require both a passing score on the Multistate Professional Responsibility Exam and a complete moral character background check before being admitted to the state bar.[30]

Critiques of law school honor codes are diverse but generally concern the degree to which the school's honor code prepares students to eventually abide by the rules of their admitting jurisdiction upon graduation.[31] In addition, some argue that the educational purpose of the law school's honor code is hindered if proceedings are not open to the public.[32] Finally, any

25. *Id.* at 826.
26. *Id.*
27. *See id.* at 810 n.43 ("Thus, codes may also express to the broader public the ideals and values of the group that promulgated the code.").
28. *See* Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools.*, 14 GEO. J. LEGAL ETHICS 839, 856 (2001) (describing how bar authorities may inquire regarding student misconduct but schools vary in the types of misconduct they report); *see also* Michael C. Wallace, *Moral Character and Fitness Means More Than Just a Passing Score to the Board of Law Examiners*, 7 CHARLOTTE L. REV. 157, 175 (2016) (describing how bar authorities focus on the applicant's character and fitness and use past misconduct as a predictive measure for the future).
29. Caroline P. Jacobson, Note, *Academic Misconduct and Bar Admissions: A Proposal for a Revised Standard*, 20 GEO. J. LEGAL ETHICS 739, 739 (2007); *see also* George L. Blum, Annotation, *Falsehoods, Misrepresentations , Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar–Conduct Related to Admission to Bar*, 107 A.L.R.5th 167, 3 (2019).
30. *See* Lori A. Roberts & Monica M. Todd, *Let's Be Honest About Law School Cheating: A Low-Tech Solution For a High-Tech Problem*, 52 AKRON L. REV. 1155, 1165 (2018).
31. *See, e.g.*, Leonard Biernat, *Why Not Model Rules of Conduct For Law Students?*, 12 FLA. ST. U.L. REV. 781, 797 (2019); David M. Tanovich, *Learning To Act Like A Lawyer: A Model Code of Professional Responsibility for Law Students*, 27 WIND. Y.B. ACCESS JUST. 75, 78 (2009).
32. Berenson, *supra* note 11, at 824–25; *see also* Sarah Ann Bassler, *Public access to law school honor code proceedings*, 15 NOTRE DAME J. L. ETHICS PUBLIC POLICY 207, 209–30 (2001).

"aspirational" goals of law school honor codes in standardizing the morals of a vastly diverse student body may be "questionable" at best.[33] Because students generally arrive at law school later in life, it may be very difficult for these institutions to re-define key tenets of morality for their students.

Ultimately, law schools must prepare lawyers to address issues before them "thoughtfully and effectively while carrying out their professional responsibilities as representatives of their clients, officers of the judicial system, and public citizens, exercising both their analytical skills, and moral judgment."[34] Schools may not be able to re-define morality, but they can certainly familiarize their students with ethical requirements of practicing law. Thus, assuming that the goal of honor codes is to prepare students for the ethics of law practice, an examination of the ethical standards of practicing lawyers is necessary before examining the effectiveness of individual law school codes.

B. EXISTING DUTIES TO REPORT AND PEER COUNSELING IN THE LEGAL PROFESSION

Model Rule 8.3 states that a "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[35] The Rule's comments elaborate, however, stating that if "a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable."[36] Thus, the Rules require an attorney to report only "those offenses that a self-regulating profession must vigorously endeavor to prevent."[37]

Although the Rules *technically* impose a duty to report, the analysis does not end there. The Rules also *empower an individual attorney to make a judgment* about the severity of the potential offense observed and report only what the observer deems to be one of those infractions which "a self-regulating profession must vigorously endeavor to prevent."[38] Perhaps this ambiguity is by design.[39] The comments accompanying Rule 8.3 are

33. Berenson, *supra* note 11, at 827.
34. Lerner, *supra* note 19, at 643.
35. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2018) [hereinafter MODEL RULES].
36. MODEL RULES R. 8.3 cmt. 3; *see also* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 265 (2003) ("[R]eliance on voluntary reporting, the norm before 1970, was found to be a failure, and bar counsel believe that remains true today.").
37. MODEL RULES R. 8.3 cmt. 3.
38. *Id.*; see also Greenbaum, *supra* note 36, at 281.
39. *See* Greenbaum, *supra* note 36, at 281 ("The Rule's ambiguous, but mandatory, standards may be intended to require lawyers to engage in self-reflection about reporting while conferring broad, but not unlimited discretion, about whether or not to report.").

ultimately "ambivalent" as to whether attorneys have a duty to report *any* observed misconduct, suggesting that the obligation is limited[40] to only "those offenses that a self-regulating profession must vigorously endeavor to prevent."[41] These amplifying notes found in the *Model Rules* are significant because they embody the profession's decision to demand and rely upon the sound ethical judgment of attorneys.

Examples of requiring ethical judgment are found elsewhere in the profession. The Federal Rules of Civil Procedure, for example, lay out certain requirements of truthfulness in making written representations regarding purposes, soundness of the legal argument, and the basis for factual allegations to courts.[42] However, Rule 11(c)(1) states that "[i]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."[43] Rule 11(c)(2) meanwhile provides the process by which an attorney may make a motion for sanctions against opposing counsel. It states that the motion "must not be filed or be presented to the court *if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected* within 21 days after service or within another time the court sets."[44] This rule does not require an attorney to request sanctions against opposing counsel immediately upon realizing that a representation to the court has been made in an untruthful manner.[45] Rather, it seems to encourage attorney communication with opposing counsel prior to the request for sanctions by the court, and thus has the ethical tool of peer confrontation built right into it.[46]

In the discovery phase, attorneys consistently resolve disputes outside of the courtroom. Trial judges rule on motions to compel or motions for protective orders, but the "vast majority of disputes that arise in the context of discovery are 'settled' by the parties among themselves, without judicial intervention."[47] There are essential human motivations underlying this assertion: maintaining good relationships with fellow attorneys and clients, attracting business, and "winning" the favor of judges.[48] For example, as a

40. ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE 983 (2014) (concluding the obligation to report is limited in nature by the Rules).
41. MODEL RULES R. 8.3 cmt. 3.
42. FED. R. CIV. P. 11(b).
43. FED. R. CIV. P. 11(c)(1).
44. FED. R. CIV. P. 11(c)(2) (emphasis added).
45. *Id.*; s*ee also* A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 571 (5th Ed. 2018) ("Opposing parties may only seek sanctions with the court 21 days after submitting a separate motion for sanctions to the alleged violator of the rule.").
46. *See* FED. R. CIV. P. 11(c)(2); Spencer, *supra* note 45, at 571.
47. Wendel, *supra* note 10 at 1572–73.
48. *Id.* at 1573; *see also* Ripple, *supra* note 22, at 361–66 (regarding need for increased civility on the part of attorneys in the course of litigation).

preliminary matter in discovery disputes, federal courts will often first examine whether the parties have "sufficiently conferred" to resolve differences.[49]

In reality, most bar disciplinary authorities dismiss a majority of complaints made against members of the bar due to a lack of probable cause; as a result, less than one percent of investigated complaints result in disbarment.[50] Further, "only a small fraction" of these complaints come from fellow lawyers, although complaints from lawyers are more likely to be investigated than complaints from clients or nonlawyers.[51] As of 2005, there were only two known cases where a lawyer was subject to disciplinary consequences for failing to report misconduct by a fellow attorney.[52] Significantly, across the nation, not all states consistently require an attorney to report any and all observed ethical violations in their respective state rules.[53] And among the states that do impose a duty to report, debate surrounding the effectiveness of such a requirement is thriving.[54] Thus, the question becomes: how are law schools preparing students to one day become practicing attorneys in compliance with these requirements?

II. THE "TOLERATION CLAUSE" PLURALITY

The pedagogical method of law schools is unique amongst its fellow graduate schools, as law school courses often singularly emphasize a student's performance on the dreaded final exam.[55] This has resulted in law students' reported "obsession" with grades which arguably "exacerbate[es] the prevalence of academic dishonesty."[56] Thus, the task of drafting an effective honor code that will ensure a fair and respectful academic environment for all is essential for law schools. The so-called "toleration clause" is one weapon in the arsenal that administrations may choose to employ.

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49. *See, e.g.*, Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-JTM-GEB, 2017 WL 2831485, at *6 (D. Kan. June 30, 2017) (in which the court first analyzed as a threshold matter whether the parties had attempted to resolve the dispute amongst themselves before proceeding to analyze the matter under the relevant rules and ethical professional standards).
50. Southworth, *supra* note 40, at 979.
51. *Id.* at 983.
52. Berenson, *supra* note 11, at 834.
53. *See, e.g.*, Southworth, *supra* note 40, at 983 (noting that California and Massachusetts do not require attorneys to report). *But see* Greenbaum, *supra* note 36, at 263 (noting that the "vast majority of the states and the ABA presently favor mandatory reporting and will continue to do so in the absence of a more compelling case to dispense with such rules").
54. *See, e.g.*, Greenbaum, *supra* note 36, at 274 (describing how the empirical data on reporting patterns is "slim" due to lack of state reports).
55. *See* Ron M. Aizen, *Four Ways To Better 1L Assessments*, 54 DUKE L. J. 765, 765–66 (2004); Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 150 (2002).
56. Roberts, *supra* note 30, at 1167.

In *United States v. Virginia,*[57] the Supreme Court defined the toleration clause as a notable feature of the Virginia Military Institute's (VMI) "adversative" method of education.[58] The school's code stated that a cadet "does not lie, cheat, steal *nor tolerate those who do.*"[59] Quite simply put, a toleration clause requires all students (and in some cases, faculty) to report an honor offense that they observe.[60] This straightforward approach is shared by the majority of service academies such as the United States Military Academy (USMA) and United States Air Force Academy (USAFA), with the United States Naval Academy (USNA) as a notable exception.[61] Although these institutions have an honor code that is notoriously blunt, they also have a "complex, multi-layered 'honor system,' which includes extensive regulations that provide a multitude of narrow rules to supplement the code itself."[62]

The standards codified in law school honor codes tend to be less straightforward than those of military academies. While some are blunt, like that of VMI's, many are vastly complex and even go so far as to list and describe various offenses. The University of Illinois College of Law, for example, enumerates the violations of misrepresentation, unfair advantage, interference with property, harassment, and gross neglect of professional duty.[63] In contrast, Stanford Law School's honor code is a mere paragraph's worth of prohibited and recommended student and faculty conduct.[64] Regardless of how a law school's honor code is codified, incorporation of some variant of a toleration clause ensures that students who observe a violation of the code, but do not choose to report it to the appropriate authority, are in violation of the code themselves. American University Washington College of Law, for example, states in its honor code that it is the "duty and obligation of every member of the WCL community—faculty, administrators, staff, and students—to assist . . . by (1) reporting facts which establish reasonable grounds to believe a violation has occurred, and (2) assisting those responsible for administering the Honor Code in

57. 518 U.S. 515, 522 (1996).
58. United States v. Virginia*,* 518 U.S. 515, 522 (1996).
59. *Id*. at 522 (emphasis added).
60. *See* Larry A. DiMatteo & Don Wiesner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 S. ILL. U. L.J. 49, 76–77 (2015).
61. U.S. GOV'T ACCOUNTABILITY OFFICE, B-260802, DOD SERVICE ACADEMIES: COMPARISON OF HONOR AND CONDUCT ADJUDICATORY PROCESSES 63 (April 1995) [hereinafter *GAO Report*].
62. Berenson, *supra* note 11, at 815 (citing DiMatteo & Weisner, *supra* note 60, at 56–57).
63. University of Illinois Law, Academic Policy Handbook 2016–17, https://law.illinois.edu/wp-content/uploads/2016/06/Academic-Policy-Handbook-JD-1617-2.pdf [http://perma.cc/5TF2-WZC9] (last visited Jan. 7, 2020) (providing for meticulously defined offenses of misrepresentation, unfair advantage, interference with property, harassment, gross neglect of professional duty, and other university offenses).
64. Stanford Honor Code, *supra* note 16.

determining whether a violation has occurred."[65] In other words, in addition to the myriad of other requirements of a student honor code, a toleration clause is an additional "rule" or "contractual duty" imposed on students—a student must not tolerate (and thus, a student must report) observed offenses.[66]

If the *Model Rules* do impose a clear unequivocal duty to report, then the argument goes, so should law schools.[67] On the other hand, the Rules may be empowering individual attorneys to decide for themselves which offenses should be reported.[68] In that case, perhaps the law school's honor code should focus on guiding students through the process of determining the severity of the offense they allegedly observed and encourage, rather than mandate, reporting. Thus, it is necessary to understand the foundation upon which arguments in favor and in opposition to a law school's incorporation of the toleration clause are based.

A. IN FAVOR OF THE TOLERATION CLAUSE

Proponents of the toleration clause argue that the clause imposes a contractual duty on students, thereby virtually ensuring student ownership of the code and higher levels of reporting.[69] Of course, this view necessarily assumes that in a system where students are not required to report observed violations, reports are unlikely to occur.[70] Thus, the true effectiveness of such a system is very difficult to measure. Regardless, scholars have argued that the incorporation of a toleration clause results in lower reports of cheating throughout the campus.[71] For example, some of the first studies done on cheating in the educational context in the 1990's concluded that self-reported rates of cheating at schools with so-called "traditional" honor codes with toleration clauses were lower than at schools that did not have a so-called "traditional" honor code.[72] Researchers reached similar conclusions in 1999.[73] But there is no way to know whether or not lower self-reports of cheating truly mean these codes are effective, or if it just means that students are less likely to admit to cheating at such an environment even in a confidential survey. After all, the largest impediment

65. American University Washington College of Law, *Honor Code for the Washington College of Law*, https://www.wcl.american.edu/studentaffairs/honorcode/ [http://perma.cc/E4E8-QD7F] (last visited Jan. 7, 2020).
66. *See* DiMatteo, *supra* note 59, at 80 ("In this case, a student has entered into a 'contract' to uphold the honor code. Therefore, by violating the honor code, one is breaching a contractual duty. American jurisprudence has strongly protected the sanctity of contractual duties.").
67. *See, e.g.*, Carlos, *supra* note 9, at 960–61.
68. *See, e.g.*, Biernat, *supra* note 31, at 816.
69. *See* Carlos, *supra* note 9, at 960; DiMatteo, *supra* note 59, at 62.
70. *See* Greenbaum, *supra* note 36, at 264.
71. JAMES M. LANG, CHEATING LESSONS 167–68 (2013).
72. *Id.* at 168.
73. *Id.*

to the enforcement of such codes is the assumption that the toleration clause is working—that is, that students are actually reporting.[74]

It is also argued that so-called non-toleration provisions in the legal profession "may enhance the legal profession's public image" and lawyer professionalism.[75] Similar arguments are proffered in favor of mandatory reporting requirements amongst state bars.[76] Higher instances of reporting, they contend, are a good thing provided that the administration is able to handle the presumably higher numbers of reports.[77] Proponents of the toleration clause assert that this "floodgate" of reporting may be calmed by carefully defining those offenses which the law school actually cares about prosecuting.[78] These types of provisions embody the idea that the law school—not the student body—knows best.

Ultimately, it is impossible to ignore that the incorporation of the clause effectively admits that the role of the institution is not to teach or "become a reformatory of morals."[79] Instead, it is to "weed out" those students who arrived with "poor moral character"—it fills no role of education or rehabilitation.[80] Notably, this is the approach favored not only by half of the nation's law schools, but it is also the "adversative"[81] method employed by a majority of the nation's service academies, who, presumably, are preparing the next generation of military officers to head into armed conflict and execute their duties ethically.[82]

B. IN OPPOSITION TO THE TOLERATION CLAUSE

Advocates against the toleration clause emphasize that the clause takes agency away from students by assuming students would not report infractions of the code in its absence, results in less student ownership of the code, and establishes a culture of fear and reporting rather than a culture of education and rehabilitation. In a law school environment, although mandating student reporting may result in a higher number of reports, this increase "must be balanced against likely widespread disregard for the reporting requirement[.]"[83] In other words, those opposed to the toleration clause argue that it may be wiser for schools to focus on incidents leading

74. *See id.* at 169; s*ee also* Greenbaum, supra note 36, at 271 (arguing that a mandatory reporting rule is worth the costs it imposes only if it is effective).
75. Berenson, *supra* note 11, at 833–34.
76. *See* Greenbaum, *supra* note 36, at 275–76.
77. *See id.*
78. *See, e.g.*, *id.* at 288.
79. DiMatteo, *supra* note 59, at 56.
80. *Id*. at 57.
81. United States v. Virginia*,* 518 U.S. 515, 522 (1996).
82. *See Honor Codes at the Service Academies: Hearings Before the Subcomm. On Manpower and Personnel of the United States Senate Committee on Armed Services*, 94th Cong. 34 (1976) (statement of Senator Hart).
83. Berenson, *supra* note 11, at 834.

up to the reporting of an offense and shaping student behaviors or motivations rather than mandating reports. While it has been contended that "enforcement of academic honesty should not be the primary responsibility of students"[84] and presumably the burden should fall on the administration, this reasoning arguably does not apply to the law school, whose students are steps away from entering the legal profession where they will be expected to act accordingly.

The toleration clause sends the message to students that they must report any and all potential offenses, thereby removing the student's own "intrinsic motivation" which may be helpful in the educative context because it allows "students opportunities to respond in authentic ways over which they have some control."[85] This is especially relevant in law school, a haven of the Socratic classroom where students are expected to be "engaging with difficult questions, thinking for oneself, challenging and being challenged by other thinkers in the room."[86]

Further, dissenters argue that "while there may be good reasons to have a mandatory reporting provision in the legal practice context . . . this is unlikely the case with regard to an academic code" and "would only undermine the seriousness with which the entire code is taken."[87] Mandating student reporting, then, may transform the student body into a group of individuals not focusing on what is and is not ethical but rather forcing them to simply serve a policing function on behalf of the administration. Because reporters are forced to interact with the accused at school, mandating student reports can often be stressful and unpleasant.[88] Schools with a toleration clause, therefore, create a culture of fear.[89] While they may have lower numbers of reports, this may just be a product of the reluctance of students to report rather than the non-existence of cheating.[90] To illustrate, only one percent of students at institutions with a "traditional" code believed that the code effectively ensured that students reported instances of cheating.[91] The students elaborated on the causes of this ineffectiveness:

> a fear of being responsible for having another student expelled, a fear of making an enemy, a concern about reporting on a friend, a fear that the accused student might actually be innocent, a code of silence that exists in some honor code environments based on the sentiment that squealing

84. Lang, *supra* note 71, at 170.
85. *Id*. at 65, 202.
86. *Id.* at 156.
87. Berenson, *supra* note 11, at 834.
88. McCulley, *supra* note 28, at 860; Greenbaum, *supra* note 36, at 270 (regarding unpleasant consequences if a lawyer learns that he has been reported by another attorney).
89. *See* Lang, *supra* note 71, at 169.
90. *See* Greenbaum, *supra* note 36, at 265 (regarding reluctance of members of the bar to report misconduct of peers); *see also* GAO Report, *supra* note 61, at 67–68 (stating that the way in which students with a reluctance to report at such institutions might also affect their view of administration of the code at large).
91. Lang, *supra* note 71, at 169.

> is worse than cheating, peer intimidation associated with the code of silence, and a fear that the instructor or administrators will not be able or willing to prosecute the offender.[92]

A campus without a toleration clause, if executed properly, can foster "self-efficacy" and actually result in less motivation for students to cheat, as cheating is less likely when students see their own learning objectives as "intrinsically fascinating, useful, or beautiful."[93] Although motivation to cheat comes in many forms, scholars have suggested that the best way to counteract this impulse is through the development of metacognition and providing students a chance to truly grasp what will be expected of them in future challenges where they may be inclined to cheat or act dishonestly.[94] Further, more important than the actual code is the "*dialogue about academic honesty that the code inspires*."[95]

C. A RELEVANT EXAMPLE

The inner-workings of law school administrations, or students in some cases, in the drafting and executing of their respective honor codes is generally not available to the public. While we know that many law schools have altered their reporting requirements over the years, it would be a significant undertaking to investigate the reasons why such a decision was made at each individual school. Fortunately, however, there are certain public institutions that have made such a decision in recent years whose internal workings are not only available to the public, but are debated in the halls of Congress. I am speaking of the United States service academies, which have been referenced at multiple points throughout this discussion thus far. I feel uniquely qualified to speak on this subject as I am a graduate of the United States Naval Academy, the only service academy which does not have a toleration clause. Further, I served there as the First Regimental Honor Adviser and was responsible for overseeing the code's execution and administration by and amongst the student body. I took pleas, made recommendations to the administrations on retention or dismissal, and presided over adversarial proceedings that took place between the student guardians of the code and their accused.

It may seem unnecessary at all to discuss the Naval Academy's honor code and its relevance to the world of legal academia,[96] but I would suggest otherwise. Although law school graduates are not "heading into battle" upon graduation, a code of ethics is a pillar requirement of both the military and legal profession. And public perception of both professions is integral

92. *Id.*
93. *Id.* at 152.
94. *See, e.g.*, Lerner, *supra* note 19, at 688–89.
95. Lang, *supra* note 71, at 172 (emphasis added).
96. *See* DiMatteo, *supra* note 59, at 85 (describing the United States Military Academy, for example, as a "unique category in higher education").

to their survival.[97] The fact that the Naval Academy's honor code has been "battle tested" only serves to legitimize its example and inform the process of revising the honor codes at any institution of higher learning, including law schools.

The Naval Academy's Honor Concept is different from many academic dishonesty policies at universities because it was drafted by and for midshipmen.[98] In drafting their honor code, the midshipmen[99] rejected a system of codification because they believed such a process would lose "the very principles upon which the whole system was based."[100] The Naval Academy's decision to do away with the toleration clause was precipitated not by a lack of honor, but *because of it*. And at times, this decision has been met with criticism.[101] In the original founding documents of the Honor Concept, the issue of toleration is addressed directly:

> The question arises, what should a midshipman do if he sees another midshipman committing an act of moral turpitude? The class Honor Committees and Brigade Executive Committee are set up to handle such cases, however, the final decision as to what action the individual seeing the act committed should take rests solely with the individual. No one is ever "honor bound" to turn in another midshipman whom he has seen commit an act of moral turpitude. The Brigade feels that the decision as to what action should be taken rests entirely with the individual.[102]

Originally, the Honor Concept directed the midshipmen in the process of deciding whether or not to report a student to consider, essentially, two matters: (1) whether or not one's fellow midshipman deserves to wear the uniform or class ring and (2) if one would willingly serve, including in combat, with the offender in the future.[103]

Today, the decision to not report, or to tolerate honor offenses, still rests with the individual, though in certain circumstances it may be processed as a conduct offense, rather than an honor offense.[104] The Naval Academy has even allowed for the alternative "approach and counsel" option in which a student can take the matter into their own hands and counsel the offender that what they did was morally reprehensible—all without making an

97. *See* Pew Research Survey, *supra* note 6.
98. H. R. Perot, The United States Naval Academy Honor Committees 31 (unpublished report, on file with the United States Naval Academy Nimitz Library) [hereinafter *Perot Report*]; *see also* Letter from H. R. Perot to Captain Buchanan, Commandant of Midshipmen (Aug. 19, 1952) (on file with the United States Naval Academy Nimitz Library).
99. Students at the United States Naval Academy are referred to as midshipmen.
100. Perot Report, *supra* note 98.
101. *See, e.g.*, Steven E. Shaw, *Naval Academy Honor Concept Strays From Roots*, CAPITAL GAZETTE, (Feb. 21, 2010).
102. Perot Report, *supra* note 98.
103. *Id.*
104. GAO Report, *supra* note 61, at 55.

official report.[105] Even following a series of public cheating scandals in the 1990's, the Naval Academy did not do away with this important provision.[106] At this critical time, the notion was that "changes in the Academy's orientation have attempted to move away from a model of leadership grounded in fear rather than aspiration; to incorporate a non-toleration clause into the Honor Concept would undermine these laudable goals."[107] An Air Force cadet summarized the alternative at the United States Air Force Academy well:

> The problem with the honor code itself is not the code—it is the way the toleration clause is enforced. There is no leeway for a cadet to confront another cadet about something—counsel them and leave it at that. If a friend of mine makes a dumb mistake—by regulation I have to turn him in. I can't talk to him and solve the problem from there. Everything has to go to a board. I think that's wrong and rather than admit I saw or witnessed a violation by counseling the person myself, I'm not going to run the risk of getting a toleration hit and I'm going to pretend I never knew a thing.[108]

There are, of course, compelling competing narratives to the Naval Academy's approach espoused by the high-ranking officers in charge of the administration of the other service academies.[109] These arguments are strikingly similar to the arguments presented above regarding the use of the toleration clause in law schools.[110]

And so, our journey now leads to examining law schools. What approach do the nation's top one hundred law schools take with their

105. United States Naval Academy, *2010 Honor Concept of the Brigade of Midshipmen* 13, https://www.usna.edu/Commandant/Directives/Instructions/1000-1999/COMDTMIDNINST-1610.3H_2010%20HONOR%20CONCEPT%20OF%20THE%20BRIGADE%20OF%20MIDSHIPMEN.pdf [http://perma.cc/MNB7-TL6U] ("informal counseling should only be used for simple mistakes").

106. *See* REPORT OF THE HONOR REVIEW COMMITTEE TO THE SECRETARY OF THE NAVY ON HONOR AT THE UNITED STATES NAVAL ACADEMY, as reprinted in Honor Systems and Sexual Harassment at the Service Academies Hearing Before the United States Senate Committee on Armed Services, 103d Cong. 1, 10 (1994).

107. *Id.*

108. GAO Report, *supra* note 61, at 56–57.

109. *Honor Codes at the Service Academies: Hearings Before the Subcomm. On Manpower and Personnel of the United States Senate Committee on Armed Services*, 94th Cong. 7 (statement of Secretary Hoffman, Secretary of the Army) ("The inclusion in the cadet honor of a proscription against toleration is not without roots in the society in general and in notions of public service in particular: It is the duty of a lawyer, for instance, to take action should he become aware of a subornation of perjury, or hiding of evidence. . . . Considerations of when friendship must be put aside in favor of a duty to an institution or the society are complex, but not to the point that to address them is impossible.").

110. *See supra* Part II.A.

respective honor codes? The result is much less standardized than one might assume.

III. Modern Law School Honor Codes

In examining modern law school honor codes, the U.S. News and World Report's top one hundred law schools' policies were examined thoroughly for the relevant provision regarding whether or not students were required to report observed violations—the toleration clause. The schools were further categorized based on U.S. News and World Report Ranking,[111] geographical location, faith affiliation, and bar passage rates according to the U.S. News and World Report.[112] At the time of this Note's publishing, only one law school, Arizona State University, had an honor code that was not publicly accessible.[113]

The data reveals that the use of the toleration clause in law school has been relatively consistent for the last four decades, only rising by four percent since 1983.[114] In a 1983 study of law school honor codes, forty-five percent of the schools surveyed throughout the United States included a toleration clause.[115] In some cases, this requirement was meant to mirror the applicable state's lawyer disciplinary rules.[116] The majority of schools surveyed, however, did not require students to report observed violations.[117] Today, forty-nine percent, or nearly half, of the U.S. News and World Report's top one hundred law schools in the nation impose a duty to report observed violations upon students. Interestingly, of those law schools that have changed their approach since 1983, the majority have changed in favor of requiring students to report.[118]

In many cases, religiously affiliated law schools were "established with the hope and expectation that the moral and religious mission of the parent university would be echoed and carried out in the law schools attached to

111. Both the 1987 and 2019 rankings were taken into account. *See* 2019 Ranking, *supra* note 2; 1987 Ranking, *supra* note 1.

112. *What schools have the best first-time bar passage rate?*, U.S. News and World Report, 2019 (on file with the author) [hereinafter *Bar Passage Rates*].

113. Arizona State University Sandra Day O'Connor College of Law has an honor code that is not publicly accessible. The school did not, however, require students to report in 1983. *See* Fritz Snyder & Shirley Goza, *Law School Honor Codes*, 76 Law. Libr. J. 585, 596 (1983). The percentages displayed in this analysis assume that this requirement is unchanged in modern times.

114. Our understanding of this data is somewhat skewed because only forty-three law schools were surveyed in 1983.

115. Snyder, *supra* note 113, at 590.

116. *Id.* at 590–91.

117. *Id.*

118. Sixty-three percent, or twelve schools, that were surveyed in 1983 have added a reporting requirement.

these institutions."[119] There appears to be only a small correlation between whether or not a law school was faith-based and the school's use of a toleration clause. While forty percent of schools with a faith affiliation required their students to report observed violations, this is only nine percent lower than the national average of forty nine percent. This seems consistent with the notion that "as society became more secularized and as other church-related universities lost some of their religious orientation . . . [schools] became less directly active in advancing moral or religious ideas."[120] For example, Georgetown University Law Center was founded by Jesuits and does not include a toleration clause in its honor code, while Notre Dame University Law School has a Catholic affiliation and requires its students to report observed violations.[121]

Geographic location, however, is somewhat relevant. Midwestern and southern law schools were slightly more likely to mandate that a student report an observed violation in their respective honor codes. Midwestern and southern schools were seven and eight percent more likely, respectively, when compared to the national average. Meanwhile, Northeastern and Western law schools were less likely to require a student to report. Western law schools were four percent below the national average, and thus four percent less likely to require their students to report. Northeastern law schools, when compared with the national average, were twenty-four percent less likely to require students to report observed violations. Notably, a law school's northwestern geographical location represented the second-most statistically relevant variable in determining whether or not the school requires its students to report an alleged honor code violation.[122]

The reported bar passage rates of law schools is also a significant factor. Thirty-nine percent of law schools with a bar passage rate above ninety percent required students to report. This is ten percent below the national average. This number drops slightly as the bar passage rate increases. For example, thirty-five percent of law schools with a bar passage rate above

119. Robert F. Drinan, *New Horizons in the Role of Law Schools in Teaching Legal Ethics*, 58 LAW CONTEMP. PROBL. 347, 350 (1995).
120. *Id.* at 350.
121. Georgetown University Law Center, 2019-2020 Georgetown Law Student Handbook of Academic Policies 104, https://georgetown.app.box.com/s/qjr82yzdyo0rdao3xheynozx9h6969rv [http://perma.cc/NWY8-2GTQ] (last visited Jan. 10, 2020) ("Complaints regarding student conduct *may* be made by any member of the Law Center community" (emphasis added)); The Notre Dame Law School Honor Code, https://www3.nd.edu/~ndlaw/currentstudents/hoynes/honorcode.pdf [http://perma.cc/78WZ-HRCL] (last visited May 11, 2020) ("All law students . . . have the duty to report promptly . . . all circumstances that they believe to constitute a clear violation of the Honor Code. Knowing breach of this duty shall be a violation of the Honor Code.").
122. *But see discussion infra* regarding top tier schools being predominately located in the Northeastern region of the United States.

ninety-five percent required students to report, only fourteen percent below the national average. Thus, schools with a high bar passage rate were moderately less likely to require a student to report an observed honor violation.

By a long shot, the most relevant predictor of a school's decision to incorporate some fashion of a toleration clause was whether or not the school was in the U.S. News and World Report's T-14.[123] This also somewhat skews our understanding of how other factors such as geography and bar passage rate factor in because schools in the T-14 tend to have higher than average bar passage rates and are predominately located in the northeast. Only two out of the fourteen schools in the T-14 have such a provision. Interestingly, the data also reveal that there is a statistical correlation between the law school's ranking and the choice to include a toleration clause made within the last forty years. In 1983, schools that are in today's T-14 that responded to the survey included the University of Pennsylvania, University of Virginia, University of Michigan, Northwestern University, and Cornell University. In 1983, the majority of these schools required students to report an observed violation.[124] Today, only one of these schools that was surveyed in 1983, the University of Michigan, imposes such a duty. And of the modern T-14 at large, only the University of Michigan[125] and Duke University impose a duty to report.

It is only possible to speculate as to why the majority of modern T-14 schools do not have a toleration clause, but a few theories may be advanced. Perhaps the administrations at these schools have a more nuanced view of what the *Model Rules* actually require their future attorneys to ethically negotiate when practicing law in the real world.[126] Perhaps these schools are motivated to a greater extent by their public image and see lower numbers

123. The U.S. News and World Report ranks law schools based on the weighted average of various measures of quality which include: peer assessment by law school deans and recently tenured faculty, assessment by practicing lawyers and judges, selectivity (median LSAT, undergraduate GPA, and acceptance rate), placement success in legal employment and bar passage rates reported to the ABA, faculty resources, library resources, and student-faculty ratio. *Methodology: 2020 Best Law School Rankings*, U.S. NEWS AND WORLD REPORT, https://web.archive.org/web/20191206074024/https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology [https://perma.ccX2GD-3FP6] (last visited April 20, 2020). The top fourteen schools include Yale, Stanford, Harvard, University of Chicago, Columbia, New York University, University of Pennsylvania, University of Virginia, Michigan (Ann Arbor), Duke, Northwestern University, University of California (Berkeley), Cornell, Georgetown University, and the University of California (Los Angeles). 2019 Ranking, *supra* note 2.

124. This includes University of Virginia, University of Michigan, and Cornell University.

125. The University of Michigan has dropped six places in the U.S. News and World Report rankings since 1987, from the number three position to the number nine position. *See* 2019 Ranking, *supra* note 2; 1987 Ranking, *supra* note 1.

126. *See generally* Greenbaum, *supra* note 36.

of reports as a good thing.[127] Perhaps they are less concerned about "weeding out" students because students at T-14 schools are more academically capable and less likely to be motivated to cheat in preparing for the bar exam.[128] Or perhaps they wish to not be administratively hindered by reporting numerous instances of alleged cheating to state bars during the moral character background check, as this would impact their students' abilities to be admitted to the bar.[129]

Ultimately, there is no way to be sure of any of these theories based on the data alone, representing a potentially boundless new opportunity for research. However, one thing is relatively certain: a school's position in the U.S. News and World Report is the most significant factor in determining whether or not it requires its students to report. Further, there are several schools in the lower 100 that have glowing bar passage rates on par with or exceeding those of the T-14 and yet do require their students to report. For example, Marquette University has a bar passage rate of one hundred percent and requires its students to report an observed honor violation.[130] The University of Oklahoma, meanwhile, requires its students to report and has a bar passage rate of nearly ninety five percent.[131] In light of this national disparity, the toleration clause is ripe for reconsideration.

IV. DITCHING THE "TOLERATION CLAUSE"

127. *See, e.g.*, Graham Zellick, *The Ethical Law School*, 36 IND. L. REV. 747, 757 (2003) ("For example, there may be an inertia on the part of those administrators who ought to deal with the matter, feeling it to be a distraction from more pressing commitments. There is the assessment that to take action will only lead to publicity which would have a damaging impact on the school and its reputation. There is the psychology of those–and it is not uncommon–who recoil from confrontations and difficult or emotionally charged situations. And there is the failure truly to comprehend the nature and quality of the issue at hand.").

128. *See* Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and Its Cures in the Lawyer Reinstatement Process.*, 40 FORDHAM URBAN L.J. 139, 173–74 (2012); Greenbaum *supra* note 36, at 268.

129. *See* Roberts, *supra* note 30, at 1168 ("such accusations may even affect the student's ability to practice law…[a]ccordingly, students wrongly accused or disciplined for academic dishonesty rightly seek exonerations"); Greenbaum, *supra* note 36, at 274 ("such a move might overwhelm local disciplinary officials or obscure some instances of misbehavior in the sheer weight of complaints to investigate").

130. Bar Passage Rates, *supra* note 112; Marquette University Law School, Academic Regulations 36 (August 2019), https://law.marquette.edu/assets/current-students/pdf/current-academic-regulations.pdf [http://perma.cc/T8XK-YPYQ] (last visited Jan. 7, 2020) (stating that "[a]ll complaints of violations . . . *shall* be submitted to the Dean in writing (emphasis added)). Notably, law students in Wisconsin may exercise the diploma privilege which allows them to be admitted to the Wisconsin bar without sitting for a bar exam.

131. Bar Passage Rates, *supra* note 112; University of Oklahoma College of Law, Student Handbook 28 (2018–2019), http://www.law.ou.edu/sites/default/files/Files/Registrar/student_handbook_2017_2018.pdf [http://perma.cc/B9H2-25F3] (last visited Jan. 7, 2020).

Proponents of the toleration clause often assert that, "[l]aw students are entering a profession where they must face the difficult task of reporting others and, therefore, they should become accustomed to this task."[132] Ultimately, the argument that law schools should impose a duty to report because the *Model Rules* impose such a duty is a flawed one. The reality of modern legal practice—and even the Rules themselves—suggest otherwise.[133] Yet, while the *Model Rules* have undergone significant changes in this area, the approach of law schools has remained relatively consistent since 1983.[134] Arguably, the growth of professional responsibility training in law schools and compulsory ethics continuing legal education have filled the gap that a reporting requirement might have relied upon.[135]

Disparity in the use of the toleration clause also reveals a deep flaw in the world of legal academia's concept of what is and is not ethical.[136] While half the nation's top law schools have chosen that the decision to "do nothing" is ethically acceptable, half have not. And very few law schools provide for any kind of peer-counseling option; often times, peer counseling is only mandated so as to determine whether an offense actually occurred and reporting still remains mandatory.[137] Further, only a limited number of schools provide for the option of any similar kind of confrontation between students and professors.[138]

What's more, while future studies of this data might reveal that the school's honor codes are drafted in such a way as to be consistent with the jurisdiction in which most students graduating will one day practice law, this conclusion is likely untenable because there is already so much discrepancy existing within a single jurisdiction. It is true that in some jurisdictions, like New York for example, law schools generally have the

132. Carlos, *supra* note 9, at 961 (citing Phillip Walzer, *W&M Students Irked By Changes To Honor Code While Some Support Changes, Many Just Want A Say*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, Feb. 26, 1996, at 3; *see also* DiMatteo, *supra* note 60, at 62.

133. MODEL RULES R. 8.3 cmt. 1–3; *see also* Greenbaum, *supra* note 36, at 265.

134. *See infra* Part III.

135. *See* Greenbaum, *supra* note 36, at 266.

136. *See* Lang, *supra* note 71, at 164–65; *see also* Roberts, *supra* note 30, at 1159 (stating that "the problem of academic dishonesty is compounded by the fact that students and professors appear to have discrepant definitions of cheating, and technological advancements have provided students more means and methods to cheat than ever before"); DiMatteo, *supra* note 59, at 80 (regarding philosophical theories underpinning ideas of ethical decision-making as it applies to the toleration clause).

137. *See, e.g.*, Washington and Lee University, Student Handbook (Sept. 2019), https://www.wlu.edu/print?title=Student+Handbook&ids=x15939%7cx15950 [http://perma.cc/8CYQ-2S6X] (last visited Jan. 7, 2020) ("Anyone with knowledge of a possible Honor Violation should confront the suspected student and ask for an explanation of the incident").

138. *See, e.g.*, McCulley, *supra* note 28 (noting that Vanderbilt University's honor process provides for faculty sanctions without formal reporting).

same requirements across the state.[139] But others, like California and Texas, are split relatively even: half of the schools requiring students to report and the other half imposing no such requirement.[140]

Debate surrounding the prevalence of cheating is thriving.[141] When cheating does occur, however, it is arguably primarily driven by a student's lack of preparation.[142] Research suggests, then, that the best defense against cheating is simply "students' knowledge, and their metacognitive awareness of that knowledge[.]"[143] Law schools serve the role of hosting the formation of students' memories and creative power they will undoubtedly draw upon as future attorneys while acting ethically in the performance of their duties.[144] They already serve this role excellently in the classroom, but at many schools, "[n]oticeably absent from the explicit teaching, except in the course on ethics, is any consideration of values."[145]

Professional ethics, however, cannot be taught with the case-method of deriving a series of rules from cases to be applied to real-world facts, but the process of doing so may inform it.[146] So what, then, is the alternative, to the toleration clause? "Ditching" the toleration clause is much more complex than simply amending a school's honor code to remove the words.

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139. Only Yeshiva University in New York imposes a duty to report on students. *See* Yeshiva University, Student Handbook (May 2019), https://cardozo.yu.edu/sites/default/files/2019-10/joint_jd-llm_student_handbook_2019-2020_updated_01oct2019_0.pdf [http://perma.cc/44DZ-QJQ8] (last visited Jan.7, 2020).

140. For example, in California, the University of California (Los Angeles) and The University of California (Irvine) require students to report, while the other law schools in the state do not. In Texas, The University of Texas at Austin requires reporting, while Texas A&M University does not.

141. *See* Lang, *supra* note 71, at 168; Hull, *supra* note 19, at 274. *But see* Ripple, *supra* note 22, at 380 ("While everyone seems to hear about stories about students stealing exams and tearing pages out of books, the percentage of law students who actually witness this type of behavior is small.").

142. Lang, *supra* note 71, at 137. *But see* Roberts, *supra* note 30, at 1160, 1165 (providing survey result of law student cheating and motivations).

143. Lang, *supra* note 71, at 135; *see also* E. Scott Fruehwald, *Developing Law Students' Professional Identities*, 37 U. LA VERNE L. REV. 1, 5–7 (2013).

144. Lerner, *supra* note 19, at 671–74 (suggesting that intuitions within culturally supported ethics become more likely to be able to be used by the student).

145. *Id.* at 681; *see also* Benjamin V. Madison, *The Emperor Has No Clothes, But Does Anyone Really Care? How Law Schools are Failing to Develop Students' Professional Identities and Practical Judgment*, 27 REGENT UNIV. L. REV. 339, 342 (2014) (suggesting that law schools provide excellent instruction in analytical skills but most the most "glaring" deficiency is schools' failure to cultivate professional ethical identity and practical judgment).

146. Lerner, *supra* note 19, at 684 (describing the instrumentalist perspective in which students do not consider "matters of professional responsibility [but] ask only how to do something"); *see also* Regina v. Instan, 1 QB 450 (1893) ("It is not correct to say that every moral obligation is a legal duty; but every legal duty is founded upon a moral obligation."); Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 J. LEG. PROF. 71, 77 (2005) (offering an example curriculum in which the *Model Rules* may serve as "governing rules" in the jurisdiction).

Indeed, "any movement to adopt honor codes is ill conceived if it is undertaken as the sole solution to the academic dishonesty problem."[147] Schools that do earnestly choose to "ditch" the toleration clause must replace their efforts with new practices of a different variety that ensure student ownership of the code, and the United States Naval Academy's journey in reaching this destination may inform the road ahead for law schools.

Law schools, or the ABA in guiding law schools,[148] must initiate and continue a conversation about integrity that begins at orientation and extends until graduation, an approach that has been defined as "contextually rich, emotionally engaged learning."[149] This includes being educated about the code, providing written versions of it in handbooks and online, and reminding students that they are accountable to the code at critical points throughout their law school career.[150] Law students must also feel a sense of ownership and accountability regarding their honor code and be given a sense that it is actually working in its administration.[151] The foundation of the code is not the words themselves, but rather, "a campus tradition of mutual trust and respect among students and between faculty members and students."[152]

The Naval Academy's approach gives an enormous amount of responsibility to young people—indeed, the notion seems shocking to some. But the miraculous thing is that *it works*. In my time serving as a Regimental

147. Lang, *supra* note 71, at 173 (quoting Donald L. McCabe & Kenneth D. Butterfield, CHEATING IN COLLEGE: WHY STUDENTS DO IT AND WHAT EDUCATORS CAN DO ABOUT IT 955 (2012).

148. Boothe-Perry, *supra* note 18, at 38.

149. Lerner, *supra* note 19, at 689 (schools may consider teaching ethics as a first year course); Ripple, *supra* note 22, at 380–81 (arguing schools should promote an ethical and civil atmosphere in law school); Ian Gallacher, *My Grandmother Was Mrs. Palsgraf: Ways to Rethink Legal Education To Help Students Become Lawyers, Rather Than Just Thinking Like Them*, 46 CAP. UNIV. L. REV. 241, 253 (2018) (suggesting traditional doctrinal method has no need for human subjects").

150. Lang, *supra* note 71, at 172; *see also* Roberts, *supra* note 30, at 1182–85 (regarding reinforcement of integrity throughout the law school curriculum); Hull, *supra* note 19, at 283–285 (proposing integration of legal ethics lessons into courses throughout curriculum); Lerner, *supra* note 19, at 706; Woolley, *supra* note 20, at 804–06; Neil Hamilton & Sarah Schaefer, *What legal education can learn from medical education about competency-based learning outcomes including those related to professional formation*, 29 GEO. J. LEGAL ETHICS 399 (2016) (suggesting law schools might benefit from competency based training as in medical school).

151. *See* DiMatteo, *supra* note 59, at 67–68 (suggesting students ideally as "shareholders" of the university).

152. Lang, *supra* note 71, at 174; *see also* Lynn. C. Herndon, *Help You, Help Me: Why Law Students Need Peer Teaching*, 78 UMKC L. REV. 809, 812 (2010) (suggesting peer teaching method that is cooperative and collaborative); Brigette Luann Willauer, *The Law School Honor Code and Collaborative Learning: Can They Coexist?*, 73 UMKC L. REV. 513, 516–21 (2004) (reviewing the benefits of collaborative learning applicable to the law school).

Honor Advisor, I took the administration of the code so seriously that it informed my decision to one day become a lawyer. Arguably, academic disagreement about statistics regarding how many reports exist at a school as a measure of code effectiveness is missing the point entirely. The real question is about student ownership of the code as a reflection of attempting to embody what will be demanded of them in the profession they have chosen to serve. And this logic applies just as much to law schools as it does to a service academy.

CONCLUSION

> [T]he virtues we get by first exercising them. . . For the things we have to learn before we can do them, we learn by doing them.
>
> – Aristotle, *Nicomachean Ethics* (1103a32-1103b2)

Harkening back to the hypothetical posed at the beginning of this Note, now imagine that you are a law school administrator considering our hypothetical first year law student's ethical dilemma. In drafting or revising your law school's honor code, should you include a toleration clause? Do the *Model Rules* and the legal profession require it? If your answer is either yes or no, half of the administrations at the top one hundred law schools in the nation disagree with you. If your answer is yes, nearly all of the administrations in the T-14 disagree with you. It seems odd that at the dawn of a new decade, after years of reform regarding the ethical teachings at the nation's law schools,[153] there should be so much national inconsistency[154] surrounding the toleration clause. But the decision whether or not to make use of the clause is important.

In 1983, Dean Wayne E. Alley of the University of Oklahoma College of Law pointed out the problem quite poignantly:

> We have not had an honor code case since my arrival in July 1981. I have been informed that our system is not particularly effective for two reasons. Students are reluctant to report instances of cheating during the course of examinations because it makes them conspicuous. The prosecutorial function has not been well conducted by students. This responsibility represents an inroad into study time, and results in derision from some peers, and has not always been done in a professional manner.[155]

153. *See supra* Part II.
154. *See* Veronica J. Finkelstein, *Giving Credit Where Credit Isn't Due (Process): The Risks of Overemphasizing Academic Misconduct And Campus Hearings In Character and Fitness Evaluation*, 38 J. LEG. PROF. 25, 44 (2013) (suggesting that standardization of academic honor codes would result in less problems associated with character and fitness requirements for bar admission).
155. Snyder, *supra* note 113, at 594.

Today, the University of Oklahoma still has a toleration clause and requires its students to report alleged violations of its honor code.[156] And yet, the Dean in 1983 believed it was not working, even then.[157] The integrity of the legal profession has always been important to preserve, but as it is especially poignant in the modern era,[158] we must examine additional paths.

The alternative to the toleration clause may be more difficult or administratively burdensome,[159] but so are most moral choices. A law school should properly educate its students about what the legal profession will require of them. It should define relevant principles and enable its students to enforce these principles amongst one another as an underpinning of its commitment to creating a community of ethically minded future lawyers. It should empower students to confront one another in self administration of the code. It should provide confidential counsel to students in navigating the choice of whether or not to report. And it should empower students to distinguish between minor offenses made out of ignorance rather than those offenses "a self-regulating profession must vigorously endeavor to prevent."[160] These administrative practices, when combined with leaving the toleration clause *out* of a school's honor code, will pay off in the long run. After all, "[s]tudents who want to learn, and who have been given all of the tools they need to learn, have no need to cheat."[161]

Law schools employ the toleration clause at their own peril. Mandating students report any and all potential honor offenses reduces an ethical skillset to a mere rule of construction and undermines the true ethical development of future lawyers. Our hypothetical first-year law student at the beginning of this Note does not have a choice. Her agency is destroyed. She will not develop the skills she needs to separate major offenses from minor ones, as the *Model Rules* require, nor will she develop the skills of peer confrontation with opposing counsel that one day a judge will likely demand of her. The ivory tower of legal academia is at a crossroads. It is time to place our trust in ourselves.

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156. University of Oklahoma College of Law, Student Handbook 2017–2018 27, https://www.law.ou.edu/sites/default/files/Files/Registrar/student_handbook_2017_2018.pdf [https://perma.cc/2XE4-DQCQ] ("Each student has an ethical responsibility to report any known or suspected violation of this Code[.]")

157. Snyder, *supra* note 113, at 594.

158. *See* Ryan Lizza, *How Trump Broke the Office of Government Ethics*, THE NEW YORKER (July 14, 2017), https://www.newyorker.com/news/ryan-lizza/how-trump-broke-the-office-of-government-ethics [http://perma.cc/J3RU-RKLX] (describing how the ethical constraints of attorneys are increasingly important in the Trump Era).

159. Lang, *supra* note 71, at 174–91 (presenting potential administrative burdens to adoption of honor codes); Lerner, *supra* note 19, at 685 (describing the role law schools should play in creating "new explicit and implicit emotional memory of being ethically responsible, while exercising the skills necessary to effective problem solving as advocates for their clients").

160. MODEL RULES R. 8.3 cmt. 3.

161. Lang, *supra* note 71, at 82.

Rank*	Law School	Geographic Location	Faith Based	Relevant Faith	Bar Passage Rates	Reporting Requirement in 1983	Modern Reporting Requirement
1 (1)	**Yale**	Northeast	No	N/A	98.3	Not surveyed	No
2 (4)	**Stanford**	West	No	N/A	94.3	Not surveyed	No
3 (1)	**Harvard**	Northeast	No	N/A	97.2	No	No
4 (6)	**University of Chicago**	Midwest	No	N/A	98.9	Not surveyed	No
5 (4)	**Columbia**	Northeast	No	N/A	97.7	Not surveyed	No
6 (9)	**New York University**	Northeast	No	N/A	97.5	Not surveyed	No
7 (10)	**University of Pennsylvania**	Northeast	No	N/A	98.5	No	No
8 (8)	**University of Virginia**	South	No	N/A	99	Yes	No
9 (3)	**Michigan (Ann Arbor)**	Midwest	No	N/A	96.6	No	Yes
10 (12)	**Duke**	South	No	N/A	97.8	Not surveyed	Yes
10 (16)	**Northwestern University**	Midwest	No	N/A	93.5	No	No
10 (7)	**University of California (Berkeley)**	West	No	N/A	89.2	Not surveyed	No
13 (15)	**Cornell**	Northeast	No	N/A	95.9	Yes	No
14 (13)	**Georgetown**	South	Yes	Roman Catholic (Jesuit)	95.6	Not surveyed	No
15 (14)	**University of California (Los Angeles)**	West	No	N/A	86	No	Yes
15	**University of Texas (Austin)**	South	No	N/A	89.3	Not surveyed	Yes

15 (17)	**University of Southern California (Gould)**	West	No	N/A	87.6	Not surveyed	No
18	**Vanderbilt University**	South	No	N/A	95	Not surveyed	No
18	**Washington University of St. Louis**	Midwest	No	N/A	95.5	Yes	Yes
20 (19)	**University of Minnesota**	Midwest	No	N/A	90.2	Yes	Yes
21	**Notre Dame University**	Midwest	Yes	Catholic	84.1	Not surveyed	Yes
22	**George Washington University**	South	No	N/A	95.8	No	Yes
23	**Boston University**	Northeast	No	N/A	87.4	No	Yes
23	**University of California (Irvine)**	West	No	N/A	80.5	Not surveyed	Yes
25	**University of Alabama**	South	No	N/A	94.5	Yes	Yes
26	**Emory**	South	No	N/A	80.8	Yes	Yes
27	**Arizona State (Phoenix)**	West	No	N/A	74.3	No	Not surveyed (Assumed Yes)
27	**Boston College**	Northeast	No	N/A	88.6	Not surveyed	No
27	**University of Georgia**	South	No	N/A	89.4	Not surveyed	Yes
27	**University of Iowa**	Midwest	No	N/A	93.2	Not surveyed	No
31	**University of California (Davis)**	West	No	N/A	75.7	Yes	No
31	**University of Florida**	South	No	N/A	76.7	Not surveyed	Yes

31	**Wake Forest University**	South	No	N/A	88.7	Not surveyed	No
34	**Indiana University**	Midwest	No	N/A	87.5	Not surveyed	Yes
34	**Ohio State University**	Midwest	No	N/A	87.1	Yes	Yes
34	**University of North Carolina**	South	No	N/A	83.8	Not surveyed	No
34 (20)	**University of Wisconsin (Madison)**	Midwest	No	N/A	100	No	No
34	**Washington and Lee**	South	No	N/A	86.7	Yes	No
39	**Brigham Young University**	West	Yes	Latter Day Saints	83.3	No	No
39	**Fordham**	Northeast	No	N/A	92.3	Not surveyed	No
39	**University of Arizona**	West	No	N/A	75.6	Not surveyed	Yes
39 (17)	**University of Illinois (Urbana)**	Midwest	No	N/A	95.3	No	No
39	**William & Mary**	South	No	N/A	79.1	Yes	No
44	**University of Washington**	West	No	N/A	85.7	Not surveyed	No
45	**George Mason**	South	No	N/A	81.5	Not surveyed	Yes
45	**University of Colorado**	West	No	N/A	87.4	No	Yes
47	**University of Utah**	West	No	N/A	86.7	No	No
48	**Baylor**	South	Yes	Baptist	92.1	Not surveyed	Yes
48	**Florida State**	South	No	N/A	81.1	No	No

48	**Temple University**	Northeast	No	N/A	83.8	Not surveyed	Yes
51	**Pepperdine University**	West	Yes	Christian	63.8	Yes	No
52	**Southern Methodist University**	South	Yes	Methodist	85	Not surveyed	No
52	**Tulane University**	South	No	N/A	90.7	Not surveyed	Yes
52	**University of Connecticut**	Northeast	No	N/A	83	Not surveyed	No
52	**University of Maryland**	South	No	N/A	76.7	Not surveyed	Yes
52	**University of Richmond**	South	No	N/A	73.1	Not surveyed	Yes
52	**Yeshiva University**	Northeast	No	N/A	85.6	Not surveyed	Yes
58	**University of Nevada Las Vegas**	West	No	N/A	79.2	Not surveyed	Yes
59	**Seton Hall**	Northeast	No	N/A	81.8	No	Yes
59	**University of Houston Law Center**	South	No	N/A	85.1	Not surveyed	Yes
59	**University of Tennessee**	South	No	N/A	86	Not surveyed	Yes
62	**Loyola Marymount**	West	Yes	Catholic	74.2	Not surveyed	No
62	**University of California (Hastings)**	West	No	N/A	58.8	Not surveyed	No
64	**Northeastern**	Northeast	No	N/A	90.1	No	No
64	**Pennsylvania State University (University Park)**	Northeast	No	N/A	92.6	Not surveyed	No

64	**University of Missouri**	Midwest	No	N/A	88.6	Yes	Yes
67	**Georgia State**	South	No	N/A	81.8	Not surveyed	Yes
67	**University of Denver**	West	No	N/A	76.8	No	Yes
67	**University of Kansas**	Midwest	No	N/A	86	No	No
67	**University of Miami**	South	No	N/A	86.3	No	Yes
71	**Brooklyn Law**	Northeast	No	N/A	78.7	No	No
71	**Case Western**	Midwest	No	N/A	91.9	Not surveyed	Yes
71	**University of Pennsylvania (Carlile)**	Northeast	No	N/A	92.1	Not surveyed	No
71	**University of Kentucky**	South	No	N/A	77.4	No	Yes
71	**University of Oklahoma**	South	No	N/A	94.9	Yes	Yes
71	**Villanova University**	Northeast	No	N/A	76.6	Yes	Yes
77	**American University Washington College of Law**	South	No	N/A	66	Not surveyed	Yes
77	**Loyola University Chicago**	Midwest	Yes	Catholic	77.8	No	Yes
77	**Rutgers University**	Northeast	No	N/A	76.4	Yes	No
77	**St Johns**	Northeast	Yes	Roman Catholic	88.6	Not surveyed	No
77	**University of Nebraska**	Midwest	No	N/A	93.4	No	No

77	**University of Pittsburg**	Northeast	No	N/A	85.5	No	No
83	**Texas A&M**	South	No	N/A	81.4	Not surveyed	No
83	**University of Cincinnati**	Midwest	No	N/A	82.3	Not surveyed	Yes
83	**University of Oregon**	West	No	N/A	85.1	No	Yes
86	**University of San Diego**	West	No	N/A	76.1	Not surveyed	Yes
87	**Illinois Tech**	Midwest	No	N/A	79.1	Not surveyed	No
87	**University of New Hampshire**	Northeast	No	N/A	91.9	Not surveyed	Yes
87	**University of Tulsa**	South	No	N/A	95.2	No	Yes
90	**Saint Louis University**	Midwest	No	N/A	92.2	Not surveyed	Yes
91	**Florida International**	South	No	N/A	86.6	Not surveyed	No
91	**Marquette University**	Midwest	Yes	Roman Catholic (Jesuit)	100	Not surveyed	Yes
91	**Michigan State**	Midwest	No	N/A	82.7	Not surveyed	No
91	**Syracuse University**	Northeast	No	N/A	91.4	Not surveyed	No
91	**University of Arkansas**	South	No	N/A	80	Yes	Yes
91	**University of Hawaii**	West	No	N/A	72.7	Not surveyed	Yes
91	**University of New Mexico**	West	No	N/A	90.4	Not surveyed	No
91	**University of South Carolina**	South	No	N/A	76.4	Yes	Yes

91	**Wayne State University**	Midwest	No	N/A	77.8	Not surveyed	No
100	**Drexel**	Northeast	No	N/A	76.1	Not surveyed	No

*1987 Rank is shown in parenthesis. In 1987, only the top 20 law schools were ranked.

Applicant Details

First Name	**Sage**
Middle Initial	**F**
Last Name	**Martin**
Citizenship Status	**U. S. Citizen**
Email Address	**sfm558@utulsa.edu**
Address	**Address** Street **3700 N. Edwards St.** City **Midland** State/Territory **Texas** Zip **79705** Country **United States**
Contact Phone Number	**5126538703**

Applicant Education

BA/BS From	**University of Tulsa**
Date of BA/BS	**June 2016**
JD/LLB From	**The University of Tulsa College of Law**
Date of JD/LLB	**May 15, 2021**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Tulsa Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Board of Advocates**

Bar Admission

Admission(s)	**Oklahoma**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Grundy, Karen
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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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September 13, 2020

The Honorable Judge Elizabeth W. Hanes
U.S. District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to express my strong interest in your clerkship position for the 2021-2023 term. As a third-year student at the University of Tulsa College of Law, I am passionate about pursuing a career that will allow me to utilize both my Master of Social Work (MSW) degree and my law degree in areas such as civil rights, constitutional law, or criminal law. I am particularly interested in an opportunity to work in your office, as I believe that a clerkship will enhance my ability to be an effective advocate for those most in need. Additionally, I would welcome the opportunity to familiarize myself with another part of the country, as my work experience thus far has been limited to Oklahoma and Texas.

During my undergraduate studies I participated in various volunteer programs and music-related extracurricular activities. Juggling these activities while also maintaining my academic work helped me to further develop my time-management skills. Moreover, through my current position as Executive Editor of the Tulsa Law Review (TLR), I have been enhancing my legal writing and editing skills and will soon have an article published in February of 2021, titled: *Unshackled: The Prison Rape Elimination Act, Claims of Sexual Abuse, and Relevancy*. Working on the TLR has given me the opportunity to refine my managerial skills, increase the efficiency of my researching capabilities, and expand my knowledge of legal topics outside of my specific areas of interest.

In an effort to strengthen my ability to be an effective advocate, I earned an MSW degree from The University of Texas. During that time, I worked as an intern at the Texas Defender Service with clients facing the death penalty. My experience as a social worker has enabled me to hone my interviewing skills, improve my communication skills, and enhance my ability to build rapport with my clients; these experiences have also given me a unique, comprehensive perspective on the criminal justice system.

During the summer of 2019, I interned at Still She Rises (SSR), a firm offering a holistic defense approach to mothers in North Tulsa. At SSR, I acquired vital experience in criminal, family, and civil law. Additionally, I had the opportunity to help clients with matters relating to fees and fines and the expungement process; this work primarily required researching and drafting various types of motions, which were submitted to the court. In continued pursuit of my passion for service, I participated in the Terry West Civil Legal Clinic in the spring of 2020, representing clients on the cost docket, creating emancipation documents, collecting data on evictions, and researching social benefits, such as SNAP, TANF, SSI, and SSDI. This summer, I accepted an internship with the Tulsa County Public Defender's office. My work on Project Commutation enhanced my understanding of sentencing laws and provided me with the opportunity to present arguments to the Oklahoma Pardon and Parole Board in an attempt to rectify excessive and unjust sentences.

I would be honored to have the opportunity to interview for your 2021-2023 clerkship position, and am confident that I possess the discipline, work ethic, and passion to be a successful clerk with your office. Thank you for your consideration, and I look forward to speaking with you soon.

Sincerely,

Sage Francess Martin

SAGE FRANCESS MARTIN, LMSW
625 S. Elgin Avenue • Tulsa, Oklahoma 74120 • Phone: (512) 653-8703 • sage-martin@utulsa.edu

EDUCATION

The University of Tulsa College of Law, Tulsa, OK
Juris Doctor Candidate, May 2021
GPA: 3.905, Rank 6/104, Top 6%
Tulsa Law Review, Executive Editor, 2020-2021
Women's Law Caucus Secretary, 2019-2020
Honors: CALI Award in Criminal Law/Administration

The University of Texas at Austin Steve Hicks School of Social Work, Austin, TX
Master of Science in Social Work, May 2018
GPA: 4.0
Honors: Helen Farabee Memorial Endowed Presidential Scholarship

The University of Tulsa, Tulsa, OK
Bachelor of Arts in Psychology, Minor in Religion, summa cum laude, June 2016
GPA: 4.0
Honors: President's Honor Roll (December 2012-May 2016)
Activities: University of Tulsa Marching Band, Concert Band, Orchestra, Quintet, Psi Chi Psychology Honor Society

PROFESSIONAL EXPERIENCE

Tulsa County Public Defender's Office – Project Commutation, Tulsa, OK (May 2020-present)
Legal Intern
- Identifying candidates for commutation
- Interviewing potential and current clients to gather relevant information
- Presenting cases for commutation to the Oklahoma Pardon and Parole Board

The Terry West Civil Legal Clinic, Tulsa, OK (January 2020-May 2020)
Academic Licensed Legal Intern
- Created Know Your Rights presentations and one-pagers involving emancipation and social benefits (SNAP, TANF, SSI, SSDI)
- Represented a client who was on the Tulsa County Cost Docket
- Synthesized observations of the Tulsa County Eviction Court to write a comprehensive report

The University of Tulsa College of Law, Tulsa, OK (August 2019-present)
Legal Writing Teaching Assistant
- Proofing assignments and course materials
- Grading assignments and quizzes

Still She Rises, Tulsa, OK (May 2019-August 2019)
Legal Intern
- Performed research on criminal, family, and civil law using Westlaw
- Drafted legal memoranda and various motions, including motions to dismiss, quash, and in limine
- Wrote Rule 8 motions and attended Rule 8 hearings to have clients' court costs dismissed
- Gathered and submitted documentation for expungements
- Compiled information to create a digest on tribal registration requirements

Texas Defender Service, Austin, TX (January-May 2018)
Social Work Intern
- Conducted witness and client interviews for mitigation purposes in capital cases
- Authored memorandums of any and all relevant interactions

Sage Martin
The University of Tulsa College of Law
Cumulative GPA: 3.958

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Charles Adams	A	3	
Contracts	Thomas Arnold	A-	4	
Deans Seminar	N/A	P	1	
Legal Writing I	Evelyn Hutchison	A-	3	
Torts	Matthew Lamkin	A	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Charles Adam	A	3	
Constitutional Law I	Johnny Parker	A-	3	
Criminal Law/Admin	Christopher Russell	A	4	
Legal Writing II	Evelyn Hutchison	A	2	
Property	Marla Mansfield	A-	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law II	Robert Spoo	A	3	
Evidence	Tamara Piety	A	4	
Legal Writing III	Karen Grundy	A-	2	
Professional Responsibility	Stephen Galoob	A	3	

I was also serving as an associate editor on the Tulsa Law Review during this semester.

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure: Police Practices	Stephen Galoob	P	3	
Decedent Estate Trust	Allen Oxford	P	3	
Terry West Civil Legal Clinic	Roni Amit	P	6	
Tulsa Law Review	Tamara Piety	P	1	

All of the grades this semester were Pass/Fail due to the COVID-19 pandemic.

Grading System Description

4.0 Grading System

Sage Martin
University of Tulsa
Cumulative GPA: 4.0

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Bassoon		A	1	
Beginning Latin I		A	4	
Contemporary Mathematics		A	3	
Introduction to Women & Gender Studies		A	3	
Musical Horizons		P	1	Pass/Fail course
Presidential Rivals in American History		A	3	
University Band		A	1	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Astronomy		A	3	
Bassoon		A	1	
Beginning Latin II		A	4	
God & Human Suffering		A	3	
Horror Movies Seminar		A	3	
University Band		A	1	
University Orchestra	Richard Wagner	A	1	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Bassoon		A	1	
Intermediate Latin I		A	3	
Native Americans and Popular Imagination		A	3	
Religion & Science		A	3	
Social Psychology		A	3	
University Band		A	1	
University Orchestra	Richard Wagner	A	1	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Abnormal Psychology	Jordan Heroux	A	3	
Chamber Music		A	1	
Inequality in American Society		A	3	

Intermediate Latin II		A	3
Protestant Reformation		A	3
Statistics for Behavioral Science		A	3
University Band		A	1
University Orchestra	Richard Wagner	A	1

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Sign Language I		A	3	
Assessment of Individual Differences		A	3	
Developmental Psychology		A	3	
Film History		A	3	
Philosophy of Religion		A	3	
University Band		A	1	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Sign Language II		A	3	
Physical Geology		A	4	
Research Methods		A	3	
Theories of Personality		A	3	
Trauma Research		A	2	
University Band		A	1	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Clinical Psychology & Behavioral Change		A	3	
Community Psychology Practicum		A	3	
Law, Ethics &, Psychological Responsibility	Stephen Galoob	A	3	
Psychology of Diversity	Michael McClendon	A	3	
Trauma Research		A	1	
University Band		A	1	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Creative Writing		A	3	
Personal Investing		A	3	

Topics in Personality	A	3
Victorian British Literature	A	3

Grading System Description
4.0 Grading System

THE UNIVERSITY OF TULSA
College of Law

OFFICE OF THE DEAN
September 2, 2020

Dear Judge,

I am writing this letter in enthusiastic support of Sage Martin's application for a clerkship with your Court. Ms. Martin was a student in my upper level Appellate Advocacy class. I have also been fortunate to have worked with Ms. Martin in her capacity as Executive Editor of the *Tulsa Law Review*. Through these contacts, I have come to know both Ms. Martin and her legal work unusually well, and I am confident that she will make a first-rate law clerk, well on the way to a distinguished career as an attorney.

In my Appellate Advocacy course, Ms. Martin was the student who raised subtle analytical points missed by many other students. Her analysis of the controlling law was thoughtful and comprehensive; her writing was clear and her points were persuasive. She did a superb job in advocating for her client's position and distinguishing negative authority. Ms. Martin's oral argument was outstanding as well. Her answers to the judges' questions were succinct and responsive and her delivery was smooth. A review of Ms. Martin's academic record discloses that her performance in my course mirrored her performance across her other classes. Intellectually, she is clearly quite superior to her peers.

In my capacity as Dean of Students, I have had a chance to work closely with Ms. Martin and to see her skills first hand. She is an exceptionally clear writer and speaker, partly due to the fact that she is also an unusually clear thinker. She has excellent lawyerly instincts and strong research skills. She is also a delightful person to work with, utterly dependable, hard-working, welcoming of feedback, and an active and constructive team participant. In particular, Ms. Martin is mature and able to work collaboratively with both peers and supervisors. Her work was always timely and well thought out. Any judge who has Ms. Martin clerking in chambers will be quite fortunate.

In short, I recommend Ms. Martin to you strongly and without reservation.

If I can be of any further assistance in your review of her application, please feel free to contact me.

Sincerely yours,

Karen M. Grundy

Karen M. Grundy
Associate Dean of Student Affairs
Professor of Legal Writing
The University of Tulsa College of Law

September 13, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I'm writing to recommend Sage Martin for a clerkship in your chambers. Sage is smart, hard-working, and attentive to detail. Her analytical and writing skills are top-notch. Equally important, she is committed to public service and a delightful person to be around. She would make an excellent clerk.

I first met Sage in 2018, when she was a new law student in my Torts class. I teach this class in a way that tests for excellent law clerks. The course is less focused on memorizing tort doctrines than on developing the ability to read carefully, to analyze legal problems, and to assemble legal arguments. Not only did Sage master these skills, she demonstrated the most valuable legal skill of all – the ability to learn, grow, and adapt. After scoring a B on her midterm, Sage took the time to meet with me to ascertain how she could improve her score on the final exam. That final exam required students to analyze a ridiculously complex fact pattern that raised issues that, frankly, even I am not entirely sure how to answer. Sage picked it apart like a pro, tying for the highest score in a class of more than 50 students. She earned a solid A in the course – just as she has earned solid As in almost every course she has taken as an undergraduate, a graduate student, and a law student.

While many students express a desire to use their law degrees to help others, Sage is already a dedicated public servant. She has an MS in social work and has assisted indigent clients as a law student – both as an intern and as a participant in our law school's legal clinic. The clinical professor who worked with Sage last semester raved about her to me. In addition to praising Sage's writing skills and professionalism, this professor noted that Sage made innovative arguments in support of her clients, demonstrating a level of analytical ability that is rare even among law students.

On a personal level, Sage is a pleasure. While she is very mature and always professional, she is also easy to talk to and quick with a smile – traits that are particularly valuable within the cozy confines of a judge's chambers.

As a former clerk for Hon. Michael W. Mosman in the United States District Court for the District of Oregon, I am certain Sage will be an excellent law clerk. If you have any questions about her candidacy, or if I can be of service in any way, please do not hesitate to contact me.

Sincerely,

Matthew D. Lamkin

Lamkin Matt - matt-lamkin@utulsa.edu

SAGE FRANCESS MARTIN, LMSW
625 S. Elgin Ave. • Tulsa, Oklahoma 74120 • Phone: (512)653-8703 • sage-martin@utulsa.edu

Writing Sample

This writing sample is an excerpt from a brief prepared for my Legal Writing II course. My professor has critiqued a previous draft.

Background facts:

Lance Vanderspeed opened a luxury vehicle dealership (Ultra of SoCal, Inc.) as one of twenty-six luxury car dealerships in the United States and one of only two in California. With all Ultra dealers selling a total of 15,000 cars per year, the customer pool is extremely limited and small.

The Defendant was hired as a Purchase and Lease Consultant. Lance instructed Defendant to begin assembling a highly detailed customer list. Over a twenty-year period, Defendant gathered information, resulting in a customer list which included 4,000 names, addresses, telephone numbers, emails, general financial information (including annual income), and specific liquid assets (such as stocks, bank accounts, and real estate).

Following the relocation of the company, Defendant abruptly resigned, leaving a vague letter in his office stating that he had quit to pursue another opportunity. The other opportunity to which Defendant referred was going to work for a rival company. Defendant had taken a copy of the customer database with him, enabling Defendant to send letters informing USI's customers of his departure. The letters that Defendant sent to these customers informed them of his new employment, implied that Lance had passed away, and that the USI dealership had closed.

The full brief is available upon request.

IN THE DISTRICT COURT OF LOS ANGELES COUNTY

STATE OF CALIFORNIA

ULTRA OF SOCAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV-2019-877
	)	Honorable John Brady
	)	
HIRAM MARQUETTE,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF TO THE TRIAL COURT ON THE TRADE SECRET ISSUE

ARGUMENT

Ultra of SoCal, Inc. is entitled to an injunction under the California Uniform Trade Secrets Act ("CUTSA") for Defendant's use of its customer database. According to the relevant statute, "affirmative acts to protect a trade secret may be compelled by court order" under certain circumstances. Cal. Civ. Code § 3426.2 (West 2015). Misappropriation of USI's database has been established, given that Defendant used the customer list to announce his new employment with USI's competitors and advertise the competitor's newest product. Because USI's customer list contains information that allows the company to derive independent economic value from the information and there were reasonable efforts to maintain that information's secrecy, it will qualify as a trade secret. Therefore, the customer list is a trade secret entitling USI to injunctive relief.

THE COURT SHOULD GRANT AN INJUNCTION TO PREVENT DEFENDANT'S USE OF USI'S CUSTOMER DATABASE BECAUSE THE CUSTOMER LIST QUALIFIES AS A PROTECTABLE TRADE SECRET.

Ultra of SoCal, Inc.'s customer database is a protectable trade secret under CUTSA. A trade secret is defined as "information" which obtains "independent economic value" from the fact that it is "not [] generally known to the public" and "is subject to reasonable efforts to maintain that information's secrecy." Cal. Civ. Code § 3426.1 (West 2015). Although the courts recognize the economic necessity of "fair and legally conducted" competition and the right to free competition, the California Legislature's passage of CUTSA in 1984 demonstrates the state's value in protecting hard work, declaring that "the right of free competition does not include the right to use confidential work product of others." *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 735 (Ct. App. 1997).

A. Ultra of SoCal, Inc.'s customer list has independent economic value because it enables Aston-Royal to direct sales to USI's specialized list of proven customers, took time and effort to compile, contains sophisticated information, and is generally unknown to others in the luxury automobile business.

Ultra of SoCal, Inc.'s customer list has independent economic value from being generally unknown, because, after twenty years of gathering a substantial amount of important information and meeting individually with customers to build relationships, it has allowed USI to direct its sales to a limited market of people who purchase luxury vehicles. Courts have consistently held that a customer list is "information" that derives independent economic value from being generally unknown when it allows competitors to direct sales to a specialized list of proven customers or the employer expends significant time and effort in compiling sophisticated information.

For example, a customer list has independent economic value when an esoteric credit insurance company's list has information that would allow a competitor to direct sales to a specific and limited number of customers. *Am. Credit Indemnity Co. v. Sacks*, 262 Cal. Rptr. 92, 97 (Ct. App. 1989). American Credit Indemnity Company (ACI) was one of three national

underwriters of credit insurance, which protected businesses against excessive debts and was sold to manufacturers, wholesalers, and certain service organizations. *Id.* at 93. The company catered to customers with annual revenues of two million dollars or more; only 6.5 percent of customers that could afford credit insurance purchased it. *Id.* Sacks, a former ACI agent, worked for the company for fifteen years and serviced forty-three of the one hundred and thirty-six policies in the Los Angeles office. *Id.* After resigning, Sacks sent letters to fifty ACI policyholders informing them of the independent agency that she was forming, offering to discuss her company's new policies with ACI's policyholders at renewal time. *Id.* at 94.

ACI filed a complaint against Sacks seeking injunctive relief. *Id.* The trial court denied ACI's application for a preliminary injunction. *Id.* at 95. ACI appealed. *Id.* at 93. The Court of Appeals of California reversed the judgment and remanded to the Superior Court regarding injunctive relief. *Id.* at 101. The court held that ACI's customer list had independent economic value and that the preliminary injunction should have been granted. *Id.*

To conclude that ACI's customer list satisfied the first prong of the trade secret test by having "potential economic value," the court looked to evidence that the customer list allowed competitors to direct sales to a specific and limited number of customers that previously displayed an inclination to purchase the company's product. *Id.* at 97. ACI had a limited number of potential customers, as only companies with over two million dollars in revenue qualified for credit insurance. *Id.* at 93. These companies were further limited to a small customer pool of an "elite 6.5 percent of [] potential customers" who purchase credit insurance. *Id.* at 97. This specialized list of proven customers also demonstrated significant independent economic value, as new clients had to be persuaded to buy credit insurance and "65 to 75 percent of policyholders renew[ed]." *Id.* Moreover, ACI was one of three firms that wrote this particular type of

insurance. *Id.* at 93. Therefore, the court ruled that ACI's customer list provided information enabling competitors to direct sales to a specialized list of proven customers; thus, the information contained independent economic value. *Id.* at 97. *See also ABBA Rubber Co. v. Seaquist*, 286 Cal. Rptr. 518, 528 (Ct. App. 1991) (holding that a customer list with information unknown to competitors that was a result of substantial time and effort which would allow competitors to direct sales to a winnowed down list of proven customers has independent economic value).

Furthermore, a customer list has independent economic value when it is the result of significant time and effort expended in gathering information that constitutes more than just identities and is not known to competitors. *Courtesy Temp. Serv. v. Camacho*, 272 Cal. Rptr. 352 (Ct. App. 1990). Courtesy Temporary Service, Inc. ("Courtesy") was in the temporary employment business, providing temporary workers to various companies, including factories, warehouses, and light industrial concerns. *Id.* at 354. Courtesy provided this service by actively recruiting, interviewing, and hiring people as its own employees and then assigning them to customer companies requesting assistance. *Id.* Leonel Camacho had worked for Courtesy for nine years as a branch manager and sales representative. *Id.* Camacho then quit to open his own competing business, Transworld Temporaries, with two former Courtesy personnel supervisors. *Id.* While employed by Courtesy, defendants gave Courtesy clients letters about their new business and directed them to pick up their paychecks at a new address, suggesting that Courtesy had simply relocated. *Id.* at 355.

Courtesy filed a complaint for injunctive relief and money damages. *Id.* at 356. The Los Angeles Superior Court partially denied Courtesy's motion for a preliminary injunction, deciding not to enjoin the defendant's stealing of Courtesy's customer list. *Id.* Courtesy appealed. *Id.* at

353. The Court of Appeals of California reversed with directions to enter a preliminary injunction consistent with its opinion, holding that Courtesy's customer list had independent economic value. *Id.* at 360.

In so holding, the court first outlined the two-prong trade secret test. *Id.* at 357. The court then stated that the policy behind CUTSA was to protect information that had been gained through "lengthy and expensive efforts." *Id.* Courtesy demonstrated that the customer list was a result of substantial time and effort, as evidenced by their advertising, promotional campaigning, canvassing, and client entertainment, which were lengthy and expensive efforts. *Id.* Furthermore, the information obtained in the customer list included billing rates, key contacts, specialized requirements and markup rates, workers' compensation information, profit margins, and other financial information. *Id.* at 358. The court also noted that this information was generally unknown to competitors, as it was not available in trade or public directory or any other source. *Id.* at 354. Therefore, the court reasoned that Courtesy had expended significant time and effort to gather sophisticated information that was generally unknown to competitors; due to these factors, the court concluded that the customer list held independent economic value. *Id.* at 358.

In *Morlife*, the court again looked at information having independent economic value from being generally unknown when it allows competitors to direct sales to a specialized list of proven customers or the employer expends significant time and effort in compiling sophisticated information. *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731 (Ct. App. 1997). Morlife, Inc. was in the business of inspecting, maintaining, and repairing roofs for commercial properties. *Id.* at 733. Perry and Bowersmith, the defendants, were a sales representative and a production manager, respectively. *Id.* Perry, who had worked for Morlife since its inception, resigned with Bowersmith to form a competing roofing company named Burlingame. *Id.* When the former

employees left, Perry took his customer business cards, that represented 75 to 80 percent of the company's customer base, that he had collected during his six years at Morlife. *Id.* At the time of the trial, Burlingame had secured thirty-two of Morlife's former customers. *Id.*

Morlife filed a complaint against Perry and Bowersmith, seeking injunctive relief and damages. *Id.* at 733. The trial court granted injunctive relief and awarded monetary damages. *Id.* Perry and Bowersmith appealed. *Id.* The Court of Appeal of California affirmed, holding that the customer list was a trade secret, as it had independent economic value. *Id.* at 740.

The court began by explaining that, while "public policy and natural justice" allow for an individual's right to competition, "such competition [must be] fairly and legally conducted." *Id.* at 734. The freedom to choose an occupation is inherent and necessary to maintain a free-market system, but that, by enacting the UTSA, California established that there is no protected right to using "'sweat-of-the-brow' by others." *Id.* at 735. The evidence demonstrated that Morlife offered an unusual roofing service to customers who were generally unknown to others in the roofing industry. *Id.* Moreover, Morlife had collected a customer list consisting of names, addresses, contact persons, pricing information, and knowledge about particular roofs and roofing needs of customers using its services. *Id.* This information was gathered over years through telemarketing, sales visits, mailings, advertising, membership in trade associations, referrals, and research and was protected by a "gatekeeper." *Id.* at 736. The court ruled that this showed that Morlife expended significant time and effort in gathering sophisticated information to compose its customer list which would "enable [a competitor] 'to solicit both more selectively and more effectively.'" *Id.* Furthermore, Morlife's telemarketing department was typically only able to make contact with ten out of a hundred people; this established that the customer pool

was limited, making Morlife's customer list specialized. *Id.* Therefore, the court concluded that Morlife's customer list had independent economic value. *Id.* at 735.

In the present case, USI's customer list is "information" that derives independent economic value from being generally unknown because it allows competitors to direct sales to a specialized list of proven customers and the employer expended significant time and effort in compiling sophisticated information. The USI case is similar to the *American Credit*, *Courtesy*, and *Morlife* cases.

First, USI's customer list has independent economic value because it enabled competitors to direct sales to a specialized list of proven customers. Because USI is in the business of selling high-end luxury automobiles, similar to *American Credit* and *Morlife*, USI's customer pool is extremely limited, selling only 15,000 cars worldwide per year. Like *American Credit*, where the customer list allowed the company to direct sales to an elite 6.5 percent of customers, USI's customer list enabled the company to direct sales to 5 to 10 percent of customers willing to purchase its product. Also, like *American Credit*, where ACI had identified the companies with over two million dollars in revenue that qualified for its product, USI had identified people who had bought or leased luxury cars before or who were considering purchasing a luxury vehicle.

Second, USI's customer list has independent economic value because the identities of people who had purchased Ultra automobiles were not generally known within the luxury automobile business. In the *Courtesy* case, the information contained in the company's customer list was not available in trade, public directory, or any other source. Similar in the present case, information as to people who had purchased luxury vehicles was not readily available in the public domain. Like the *Morlife* case, where the company offered an unusual roofing service to

customers who were not generally known in the industry, USI offered unusual vehicles that were purchased by a generally unknown customer pool.

Third, USI's customer list has independent economic value because USI put substantial time and effort into building its customer list. Similar to the customer list that was compiled over a period of years in *Morlife*, USI's customer list was created in 1998 and built over a twenty-year period, ultimately resulting in a list of over four thousand names. Both of the companies in *Morlife* and *Courtesy* gathered information through various means, such as advertising, promotional campaigning, canvassing, client entertaining, telemarketing, mailings, and making sales visits. Similarly, USI's employees met with every single customer to form personal relationships and conducted a marketing study over a period of years.

Fourth, USI's customer list has independent economic value because it included information that consists of more than just identities. The company in *Courtesy* had a customer list that included billing rates, key contacts, specialized requirements, and mark-up rates; the company in *Morlife* had a list with names, addresses, contact persons, pricing information, and needs of customers. Similarly, USI's customer list consisted of names, addresses, telephone numbers, emails, and financial information, including annual income, liquid assets, stocks, banking accounts, and real estate.

The *American Paper & Packaging Products, Inc. v. Kirgan* case does not apply to the present case for several reasons. 228 Cal. Rptr. 713 (Ct. App. 1986). First, the company in that case sold generic packaging and shipping materials, whereas USI sells luxury automobiles in a specialty market. Additionally, unlike USI's customers who were unknown to competitors, American Paper served customers who were generally known in the business. *Id.* at 717. Moreover, USI's customer list consisted of names, addresses, telephone numbers, emails, and

financial information, such as annual income, liquid assets, stocks, banking accounts, and real estate; American Paper's customer list consisted of unsophisticated information of simply names, addresses, and telephone numbers. *Id.* at 714. Unlike the significant effort USI put into building its customer list over twenty years of continuous interaction, American Paper made cold calls and drove around, which the court reasoned was "neither [a] sophisticated [process] nor difficult nor particularly time consuming." *Id.* Finally, this case is distinguishable because USI personally built relationships with its customers, unlike American Paper, which had no prior relationships with customers. *Id.* at 717.

Because of the similarities to the *American Credit, Courtesy,* and *Morlife* cases, and the differences from the *American Paper* case, USI's customer list is "information" that derives independent economic value from being generally unknown because it allows competitors to direct sales to a specialized list of proven customers and the employer expended significant time and effort in compiling sophisticated information. USI has demonstrated the existence of all of the factors courts consider when determining independent economic value.

B. USI took reasonable efforts to maintain the secrecy of its customer list because it required employees to sign confidentiality agreements, limited employee access to the customer database, and required an employee orientation on how to protect its customer information.

Ultra of SoCal, Inc.'s customer list satisfies the second prong of the trade secret test, as USI made reasonable efforts to maintain the secrecy of its customer list. In order for "information" to constitute a trade secret, there must be reasonable efforts to maintain the information's secrecy through such means as requiring the signing of confidentiality agreements, restricting access to the information, or advising employees that the information is confidential.

For instance, in the *American Credit* case, the court held that the second prong of the trade secret test was met because the company required its employees to sign confidentiality

agreements and informed the employees of the customer list's confidential nature. 262 Cal. Rptr. at 97. Similarly, in the *Courtesy* case, the court held that the customer list satisfied the second prong of the test, as the company had a policy to give restricted access to the customer list "only on an 'as needed basis.'" 272 Cal. Rptr. at 358. Finally, in the *Morlife* case, the court held that Morlife made reasonable efforts to maintain secrecy of its customer list when it was stored on a computer with restricted access, there were confidentiality provisions in its employment contract, and the company's employee handbook stated that it considered the information to be valuable and confidential. 66 Cal. Rptr. 2d at 735.

Like the *American Credit* and *Morlife* cases, where the companies required employees to sign confidentiality agreements, USI also had its employees sign confidentiality agreements. Similarly, as in the *Morlife* and *Courtesy* cases, where there was restricted access to the customer list, USI allowed only three employees to have access to its customer list. Furthermore, like the employee handbook in *Morlife*, USI required its employees to go through an orientation on how to maintain the secrecy of the customer list, procedures for collecting information, and how to forward that information to an employee authorized to handle the customer list. Therefore, USI made reasonable efforts to maintain the secrecy of its customer list.

Applicant Details

First Name	**Emily**
Last Name	**McDaniels**
Citizenship Status	**U. S. Citizen**
Email Address	**emamcdan@iu.edu**
Address	**Address** Street **701 North Indiana Ave** City **Bloomington** State/Territory **Indiana** Zip **47408** Country **United States**
Contact Phone Number	**(919) 636-1219**

Applicant Education

BA/BS From	**Vassar College**
Date of BA/BS	**May 2018**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 6, 2022**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Sherman Minton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nagy, Donna
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Geyh, Charles
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References

Donna Nagy: (812) 856-2826 | dnagy@indiana.edu
Shana Wallace: (812) 855-3789 | wallshan@iu.edu
Charles Geyh: (812) 855-3210 | cgeyh@indiana.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily A. McDaniels

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May 19, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Magistrate Judge Hanes:

I am a 2L at Indiana University Maurer School of Law and am writing to apply for the clerkship position with your chambers in the United States District Court for the Eastern District of Virginia during the 2022-2024 term. I would be excited to learn from your experiences as a woman on the bench and to work together to provide fair and just remedies for those appearing before the court. I am looking to further develop my legal research and writing abilities, gain more hands-on exposure to the practice of litigation, and continue my commitment to public service. Additionally, after growing up in North Carolina and interning in Washington, D.C. several times, I hope to clerk in the Richmond so I can continue building my career close to my family and friends in the area.

The skills I have developed thus far in my professional and academic career, including those from my work with the *Indiana Law Journal* and my federal internships, would enable me to contribute to your work effectively and immediately. During my time in the Department of Energy's Office of the General Counsel, I was involved in a variety of research projects pertaining to both litigation and enforcement cases. I provided my analysis both in formal memos and in informal work product. I often had to present my research process and analysis to the assigning attorneys, and I was proactive in preparing key points and anticipating follow-up questions in advance. I am looking forward to continuing to build these skills as an intern with the Federal Aviation Administration this summer. As a clerk in your chambers, I would be able to successfully complete research and writing assignments and effectively communicate my findings to assist in the management of your caseload.

In addition to my academic and work experience, I would bring years of effective teamworking to your chambers. As a collegiate swimmer, I honed my ability to work as a member of a team. While I was team captain, I regularly collaborated with my co-captain, teammates, and coaches to develop plans that played to everyone's strengths and enabled everyone to improve the team as a whole. I also tackled problems relating to individuals' contributions to the team and frequently had to address those concerns with team members. These experiences would help me to work with you and the rest of the Court's staff to resolve conflicts between parties and reach the best possible outcome in each case.

I have also submitted my resume, writing sample, law school and undergraduate transcripts, and letters of recommendation. I welcome the opportunity to discuss my qualifications for the clerkship with you. Thank you for your consideration, and I look forward to hearing from you soon.

Sincerely,

Emily McDaniels

Emily McDaniels

Emily A. McDaniels

emamcdan@iu.edu | (919) 636-1219 | 701 North Indiana Avenue, Bloomington, Indiana 47408

EDUCATION

Indiana University Maurer School of Law Bloomington, IN
J.D. Candidate (GPA: 3.673/4.000, Top 20%) May 2022

- Honors: Dean's Honors (Spring 2021, Fall 2020), Vassar Law Scholar Award
- *Indiana Law Journal*: Senior Managing Editor (2021-22), Associate (2020-21)
- Sherman Minton Moot Court: Best Brief Honors and Octofinalist (Fall 2020)
- Public Interest Law Foundation: Secretary (2020-21)
- Volunteer Income Tax Assistance: Student Volunteer (2019-20)

Vassar College Poughkeepsie, NY
B.A., Urban Studies and French and Francophone Studies with Honors (GPA: 3.64/4.00) May 2018

- Varsity Swim and Dive Team: Captain (2017-18), Member (2014-17)
- Department of French and Francophone Studies: Academic Intern (2017-18)
- Professor Patricia-Pia Célérier: Research Assistant (2016-17)
- Middlebury College: Summer Studies at the Language School of French (Summer 2015)

LEGAL EXPERIENCE

Office of the Chief Counsel, Federal Aviation Administration Washington, D.C.
Legal Extern for the Enforcement Division June-August 2021

Indiana University Maurer School of Law Bloomington, IN
Research Assistant for Acting Executive Associate Dean Donna Nagy August 2020-Present

- Reviewed Dean Nagy's securities law nutshell and revised the index for the second edition
- Researched and drafted summaries of securities cases, agency investigations, and scandals
- Identified sources and quotes to support assertions that Dean Nagy will make in a forthcoming article

Office of the General Counsel, U.S. Department of Energy Washington, D.C.
Law Student Intern for the Office of Litigation and the Office of Enforcement May-July 2020

- Researched and drafted memos and other written work product regarding issues ranging from litigation defenses to administrative procedure and judicial deference
- Presented work product to attorneys, explained pertinent issues, and recommended next steps
- Analyzed and summarized documents to facilitate locating information in upcoming litigation
- Drafted and sent letters and notices to manufacturers and tracked responses

Yates, McLamb & Weyher, LLP Raleigh, NC
Administrative Services Coordinator August 2018-June 2019

- Drafted letters to other parties and communicated with clients by phone and in person
- Proofread, filed, and distributed documents to prepare for litigation
- Took notes on attorneys' behalf at mediations and meetings for later reference

Office of Congressman David Price Washington, D.C.
Congressional Intern June-August 2017

- Drafted letters and memos to constituents, staff, and Members of Congress conveying the Congressman's views on and plans for proposed, pending, and passed legislation
- Took notes at meetings and tracked legislation updates and current events on behalf of staff
- Guided tours of the Capitol Building at least once a week

INTERESTS

Training for my first triathlon | Experimenting with cooking and baking | Teaching myself how to knit

Academic Record of **McDaniels, Emily A.**

J.D. in progress

Graduated from **Vassar College** on 5/1/2018. Major: French.

Student ID: 0003201945

Indiana University
Maurer School of Law -- Bloomington

I Semester 2019-2020

Contracts	Mattioli, M.	B501	4.0	A-
Legal Res & Writing	Downey, R.	B542	2.0	A
Civil Procedure	Geyh, C.	B533	4.0	A-
Torts	Gjerdingen, D.	B531	4.0	B
Legal Profession	Wallace, S.	B614	1.0	S

Sem 49.60/14=3.54 `Cum 49.60/14.0=3.543 Hours passed 15.0

II Semester 2019-2020

Legal Res & Writing	Downey, R.	B543	2.0	S
The Legal Profession	Wallace, S.	B614	3.0	S
Property	Stake, J.	B521	4.0	S
Constitutional Law I	Williams, D.	B513	4.0	S
Criminal Law	Scott, R.	B511	3.0	S

Sem 0.00/0=0.00 `Cum 49.60/14.0=3.543 Hours passed 31.0

I Semester 2020-2021

Indiana Law Journal	Sanders, S.	B674	1.0	S
^Appellate Advocacy	Lahn, S.	B642	1.0	S
Corporations	Foohey, P.	B653	3.0	A-
Accounting for Lawyers	Head, J.	B652	2.0	S
Civil Procedure II	Wallace, S.	B534	3.0	A-
*#S Judicial Conduct	Geyh, C.	L714	3.0	A

Dean's Honors Sem 34.20/9=3.80 `Cum 83.80/23.0=3.643 Hours passed 44.0

II Semester 2020-2021

Wills & Trusts	Stake, J.	B645	3.0	A-
Indiana Law Journal	Sanders, S.	B674	1.0	S
^Advanced Legal Research	Ahlbrand, A.	B639	2.0	A
Securities Regulation	Nagy, D.	B727	3.0	A
Antitrust	Wallace, S.	B729	3.0	B+
Evidence	Orenstein, A.	B723	3.0	A-

Dean's Honors Sem 52.10/14=3.72 `Cum 135.90/37.0=3.673 Hours passed 59.0

Summer I 2020-2021

^Public Interest Ext	Daghe, L.	B547	4.0	

Sem 0.00/0=0.00 `Cum 135.90/37.0=3.673 Hours passed 59.0

Hours Incomplete 0.0

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student .

122401

ASK BANNER

Vassar College Student Transcript
UNOFFICIAL

Student Name: **McDaniels, Emily Anne**
Student No.: **999-46-0440**

Degree(s) Awarded: AB
Degree Major(s): FREN, URBS
Graduation Date(s): MAY-27-2018
Comments:

Class Year: 2018
Status: GR
Current Major(s): FREN, URBS

Department Honors: FREN

Adviser: Celerier, Patricia-Pia
Adviser: Koechlin, Timothy

Freshman Course Requirement Met? YES
Quantitative Requirement Met? YES
Foreign Language Requirement Met? YES

Vassar College Work

201403 Fall 2014 Attempted units: 4.0 Earned units: 4.0 Term GPA: 3.35

AFRS 109	Modern Arabic Literature	1.0	A-	1.0
FREN 206	Intermediate French II	1.0	A-	1.0
HIST 160	Rediscovering U.S. History	1.0	B-	1.0
INTL 106	Perspectives/International Std	1.0	B+	1.0

201501 Spring 2015 Attempted units: 3.5 Earned units: 3.5 Term GPA: 3.80

ASTR 105	Stars/Galaxies/Cosmology	1.0	A-	1.0
FREN 210	Francphne Wrld:Text,Sound,Imag	1.0	A-	1.0
PHED 320	Varsity Women's Swim & Dive	0.5	SA	0.5 SU
POLI 160	International Politics	1.0	A	1.0

201503 Fall 2015 Attempted units: 4.0 Earned units: 4.0 Term GPA: 3.57

HISP 105	Elementary Spanish Lang	1.0	A	1.0
POLI 140	Amer Politics:Conflict & Power	1.0	B+	1.0
POLI 150	Comp Pol:Analyzing Pol/World	1.0	B+	1.0
URBS 100	Intro to Urban Studies	1.0	A-	1.0

201601 Spring 2016 Attempted units: 5.0 Earned units: 5.0 Term GPA: 3.85

FREN 242	Mirrors of Ink	1.0	A	1.0
FREN 290	FR Tutor/Holy Trin Sch	0.5	SA	0.5 SU
HISP 106	Elementary Spanish Lang	1.0	A	1.0
PHED 320	Varsity Women's Swim & Dive	0.5	SA	0.5 SU

URBS 200	Urban Theory	1.0	A-	1.0
URBS 257	Genre & the Postcolonial C	1.0	A-	1.0

201603 Fall 2016 Attempted units: 4.0 Earned units: 4.0 Term GPA: 3.57

GEOG 220	Cartography:Making Maps w/GIS	1.0	B+	1.0
INTL 208	Human Rights/US Foreign Policy	1.0	A-	1.0
POLI 267	Cultures of Insecurity	1.0	A	1.0
URBS 250	Urban Space/Place/Environment	1.0	B+	1.0

201701 Spring 2017 Attempted units: 5.0 Earned units: 5.0 Term GPA: 3.70

ENST 188	Climate Change: A Global Chall	0.5	SA	0.5 SU
FREN 290	FR Teacher/Holy Trin Sch	0.5	SA	0.5 SU
FREN 366	L'Ecole et la Republique	1.0	A-	1.0
INTL 235	Ending Deadly Conflict	1.0	A-	1.0
PHED 320	Varsity Women's Swim & Dive	0.5	SA	0.5 SU
POLI 245	Courts,Judges&Amer; Judcial Po	1.0	A-	1.0
URBS 290	Dept. of Planning Intern	0.5	SA	0.5 SU

201703 Fall 2017 Attempted units: 4.0 Earned units: 4.0 Term GPA: 3.61

FREN 370	Stylistics & Translation	1.0	A	1.0
HIST 232	Fran/N Afr:Corsairs-post-Colon	1.0	A	1.0
POLI 346	Race&Gender;/Judicial Politics	1.0	B	1.0
URBS 290	Dept. of Planning Intern	0.5	SA	0.5 SU
URBS 300	Senior Thesis/Project	0.5	B+	0.5

201801 Spring 2018 Attempted units: 4.0 Earned units: 4.0 Term GPA: 3.72

HIST 214	Root Palestine-Israel Conflict	1.0	A-	1.0
HIST 351	Problems/U.S. Foreign Policy	1.0	A-	1.0
PHED 320	Varsity Women's Swim & Dive	0.5	SA	0.5 SU
URBS 301	Senior Thesis/Project	0.5	B+	0.5
URBS 303	Memory,Planning & Placemaking	1.0	A	1.0

Transfer Credit Work

CEEB - Advanced Placement

ENVI	Environmental Science	1.0	TR	1.0
FREN	French Language	1.0	TR	1.0
MATH	Statistics	1.0	TR	1.0
POLI	Comparative Govrnmt & Politics	1.0	TR	1.0

Middlebury College

FREN	Advanced Grammar	0.5	*A-	0.5
FREN	Oral Production & Pronunciatio	0.5	*A-	0.5
FREN	Writing in French/Adv Composit	1.0	*A-	1.0
FREN	Young People and Politics	1.0	*B+	1.0

Total NRO Units: 0.0
Total Ungraded Units: 4.5
Total Vassar Earned Units: 33.5
Total Transfer Earned Units: 7.0

OVERALL Earned units: 40.5 GPA: 3.64

May 19, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am delighted to write in support of Emily McDaniels' application to be your law clerk for the 2022-23 term. I had the pleasure of meeting Emily several years ago, when she sought my advice in connection with the law school application process. The following year we became better acquainted when, to my great delight, she matriculated as a first-year student at Indiana University Maurer School of Law. Emily then began working for me as a research assistant at the start of her 2L year, and she is currently an enthusiastic and highly valued participant in my Securities Regulation course. I therefore stand well positioned to provide this wholehearted recommendation.

Emily and I met through the pre-law program at Vassar College. As a Vassar graduate from more than thirty years ago, I regularly converse with students and younger alums interested in attending law school. Emily was in the process of finalizing her law school applications and took me up on my willingness to answer questions and offer advice. She also sought out information about a new partnership program that IU Maurer developed with Vassar and several other small liberal arts colleges. The programs provide scholarship funding and mentorship to highly successful seniors and recent graduates bound for law school. In view of her outstanding undergraduate record and dedication to pursuing a career in law, it was an easy decision for the IU Maurer Admissions Office to select Emily as a Vassar Law Scholar.

In my role as Emily's mentor, I met with her periodically during her 1L year to discuss her coursework, the application process for a summer internship, and her interest in learning more about securities litigation through work for me as a research assistant. Spending time with Emily is always a pleasure. She is thoughtful, ambitious, engaging, and intellectually curious, with a wonderful sense of humor. While it was clear that Emily's law studies were a top priority, she also placed great value on forming new friendships with her classmates and contributing to law school clubs and activities, including through a leadership role in the Public Interest Law Foundation and pro bono service as a volunteer with Maurer Law's Income Tax Assistance Project.

Emily's work in her 2L year as my research assistant has been consistently excellent. She cheerfully assisted with proofreading the manuscript for the second edition of my "nutshell" book on Securities Litigation and Enforcement, and she took full responsibility for revising the book's index. Both assignments demanded careful attention to detail under tight publication deadlines, but Emily also engaged with the material with an eye toward projects down the road that would benefit from such background knowledge. She then drew on that knowledge later in the semester when I asked her to research recent insider trading scandals involving the use of confidential government information. With minimal guidance or effort on my part, Emily prepared a truly useful memorandum that reflected rigorous research, sound judgment in providing context without overloading on details, and excellent writing skills.

Emily has also stood out as one of my most engaged students, from the very start of my spring semester course in Securities Regulation. Teaching and learning over zoom throughout this pandemic has been a challenging experience for professors and students alike. So I am particularly grateful to top students like Emily for their willingness to engage in the type of lively and productive interchanges—with me and their fellow students—that are critical to a law school class's overall success. The clear thinking and strong command of the subject matter that is evident from Emily's frequent class participation has me expecting an equally impressive performance on her final exam that is still several weeks away.

For all of these reasons, I believe that Emily would excel as a law clerk. She would work incredibly hard to meet and exceed your expectations, and your chambers would benefit from her dedication, intelligence, energy, and enthusiasm. If I may be of any further assistance in your evaluation of Emily's application, please do not hesitate to contact me. I can be reached at 812-856-2826 or dnagy@indiana.edu.

Sincerely,

Donna M. Nagy
Acting Executive Associate Dean
and C. Ben Dutton Professor of Law
Indiana University Maurer School of Law
211 S. Indiana Ave, Bloomington, IN 47405

dnagy@indiana.edu
812-856-2826

May 19, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter in enthusiastic support of Emily McDaniels' application for a clerkship beginning in the fall of 2022. I recommend her to you as an excellent student and a wonderful person, who will make an outstanding clerk.

I met Emily in the fall of 2019, when she was a student in my civil procedure course. I taught civil procedure to the entire first year class that fall—180 students in total—which made it difficult to get to know any one of my students particularly well, including Emily. She nonetheless distinguished herself over the course of office hour and podium visits, where she impressed me as an exceptionally smart and dedicated student with an extraordinary work ethic. Civil Procedure is a tough course that requires a different kind of rigor than that needed to excel in common law courses like torts and contracts. Its precise, rule-driven emphasis is daunting to many, but Emily attacked the subject with the highly organized, unflappable grace of a seasoned litigator. She came to my office fully prepared and asked the right questions and the right follow-ups until her command of the subject was complete. It thus came as no surprise to me, when Emily received an A- in the course, placing her in the top 10% of my class.

As impressive as Emily was in civil procedure, I did not really acquire an appreciation for how her mind worked until last semester, when she was a student in my seminar on judicial conduct. Emily participated actively in the seminar, and her observations were invariably thoughtful and trenchant. For her seminar paper, Emily wrote on the topic of "The Problems of Increasing Voter Participation in Judicial Elections." Emily began by discussing the role that voter participation plays in democratic theory, and the underlying assumption that increasing voter participation is both essential to and good for a fully functioning democracy. She argued, however, that this was not necessarily the case in the context of judicial elections. Drawing heavily on empirical research, she argued that the tactics known to increase voter participation in judicial races—exorbitant interest group spending, attack advertising, and hotly contested partisan races—undermined the role of an impartial and independent judge in a democratic republic. In so arguing, she challenged the conclusions of leading political scientists in the field and did so in a clear and convincing way. It was a beautifully written, superbly researched, and powerfully argued paper, that earned her a well-deserved A for the seminar.

Emily's resume underscores that she is indeed one of our best and brightest students, whose skill set is unusually well suited for federal judicial clerkship: She received a rare "A" in legal writing, and best brief honors in our school-wide moot court competition, which validates my assessment, based on the paper she wrote for my seminar, that she is one of the best writers in the building. She has been elected to serve as the senior managing editor of the Indiana Law Journal, which speaks not only to the trust her colleagues place in her skills and leadership ability, but also corroborates my observation that her work ethic and attention to detail are second to none. And she will have worked for two federal agencies and undertaken significant research and writing on federal securities law as a research assist for our executive associate dean, which should serve her well as she begins work in the federal judicial system.

On a personal level, Emily is simply great. Her calm demeanor and gentle sense of humor make her a joy to work with and ensure that she will be an asset to your office. In short, Emily is an exceptional candidate who will serve you well. I urge you to hire her.

Sincerely,

Charles G. Geyh
Distinguished Professor and John F. Kimberling Professor of Law
Indiana University Maurer School of Law
211 S. Indiana Avenue
Bloomington, IN 47405
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812-856-3210

Emily A. McDaniels

emamcdan@iu.edu | (919) 636-1219 | 701 North Indiana Avenue, Bloomington, Indiana 47408

Writing Sample

The following writing sample is an excerpt from the appellate brief that I wrote for the Sherman Minton Moot Court Competition at Indiana University Maurer School of Law. Although I received general comments from my partner for the competition, this writing sample reflects my own work.

The facts of the case involved the adoption of a child, K.Z., who is eligible for membership in a Native American tribe through her father's bloodline. However, K.Z.'s mother raised her as a single parent, and she alone decided to put K.Z. up for adoption in state court. The judge overseeing the adoption concluded that the Existing Indian Family Exception to the Indian Child Welfare Act applied to K.Z.'s situation, permitting the proceeding to occur in state court. K.Z.'s father subsequently attempted to reenter their lives, only to find that K.Z. had been adopted by a non-Native American couple. K.Z.'s father and his tribe brought the present lawsuit against the adoptive couple and the state court judge in a federal district court. All of the aforementioned events occurred in the fictional state of Arcadia.

For the competition, I represented the defendants, and the following brief addresses whether the federal court should abstain from hearing the case under the *Younger* doctrine. *Younger v. Harris*, 401 U.S. 37 (1971). I have omitted all sections of the brief except for my preliminary discussion of the *Younger* doctrine and the first prong of my analysis.

I. The district court should have abstained from deciding this case under *Younger* because adoption proceedings fit within the third *Sprint* category, this case satisfies all *Middlesex* elements, and there are no exceptional circumstances that render abstention inappropriate.

Throughout America's history, Congress has "manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). This desire reflects the federal government's "proper respect for state functions." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975). It also recognizes "that the entire country is made up of a Union of separate state governments[] and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* In short, the principal purpose of federal abstention is to preserve "equity, comity, and federalism" among the states and the federal government. *SKS & Assocs. v. Dart*, 619 F.3d 674, 678 (7th Cir. 2010); *see also Juidice v. Vail*, 430 U.S. 327, 334 (1977). Thus, while the federal government may be "anxious . . . to vindicate and protect federal rights and federal interests," it may not interfere with the legitimate activities of the states in doing so. *Younger*, 401 U.S. at 44.

In keeping with these principals, the Supreme Court established a doctrine in *Younger v. Harris* that precludes federal courts from interfering with claims related to pending state criminal proceedings. *Id.* at 43–47. In the years since that decision, courts have expanded *Younger's* holding to apply to certain types of both criminal and civil state proceedings. *See, e.g.*, *Huffman*, 420 U.S. at 594. Additionally, the Court in *Middlesex* provided a framework that lower courts have used to evaluate whether abstention under *Younger* is appropriate. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). If all three aspects of *Middlesex* are met, courts then consider whether there are any exceptional circumstances that would render abstention inappropriate. *E.g.*, *Minn. Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 553–54

(8th Cir. 2018); *Sykes v. Cook Cnty. Cir. Ct. Prob. Div.*, 837 F.3d 736, 741 (7th Cir. 2016). Then, in *Sprint*, the Court listed explicit categories of situations that warrant abstention, and it announced that the considerations rooted in *Middlesex* were "*additional* factors" for courts to consider prior to abstaining. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 81 (2013).

The material facts of this case are undisputed, and, as discussed below, this case meets all applicable requirements for abstention under *Younger* to be appropriate. Therefore, the district court erred when it declined to abstain, and this Court should grant Defendants' motion for abstention. The following sections of this brief discuss the application of *Sprint*, each *Middlesex* element, and the exceptional circumstances consideration.

A. **The district court should have abstained because federal interference in state court adoption procedures would seriously impede Arcadian courts' ability to perform their judicial functions.**

For a court to abstain under *Younger*, the case in question must fit within one of the following categories: (1) "state criminal prosecutions," (2) "civil enforcement proceedings," or (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013); *see also New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367–68 (1989). The proceeding at issue in this case falls under the third category, so the district court should have abstained.

If the outcome of a case would unduly interfere with a state's ability to carry out its legitimate activities, a federal court must abstain. In *Juidice*, a federal court enjoined enforcement of a state's contempt procedures. *Juidice v. Vail*, 430 U.S. 327, 338 (1977). The Supreme Court reversed, explaining that the contempt power "lies at the core of the

administration of a State's judicial system," and that the federal court's interference was therefore a direct offense to the state's interest. *Id.* at 336 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13–14 (1987) (reversing a federal injunction that would "challenge the very process by which . . . judgments were obtained"). Additionally, the court in *Falco* determined that the plaintiff's federal lawsuit implicated the way that state courts managed divorce and custody proceedings, and the court held that state court orders in such cases were "integral to the State court's ability to perform its judicial function." *Falco v. Justs. of the Matrim. Parts of the Sup. Ct. of Suffolk Cnty.*, 805 F.3d 425, 427–28 (2d Cir. 2015). In contrast, in *Sprint*, the Court held that federal abstention was unnecessary when the plaintiff sought review of an order issued by a utility board because that type of proceeding does not "touch on a state court's ability to perform its judicial function." *Sprint*, 571 U.S. at 72, 79.

A federal court should not abstain from lawsuits that do not implicate a state's procedures. In *Cook*, the court held that *Younger* did not apply in a surrogacy contract case because the plaintiff's claim involved a constitutional challenge to a state statute. *Cook v. Harding*, 879 F.3d 1035, 1041 (9th Cir. 2018). There, the court indicated that to successfully argue for abstention under *Younger*, the case must instead center around the process by which courts carry out their judicial functions, rather than the constitutionality of legislation. *Id.* Furthermore, the plaintiff's claim in *Malhan* focused on the debt resulting from judicial orders in a child support case. *Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 463 (3d Cir. 2019). In that case, the court held that *Younger* could not apply because child support payments did "not ensure that family courts can perform their functions—they are merely the output of those functions." *Id.* (citing *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 703–04, 705 n.2

(5th Cir. 2017)); *see also Juidice*, 430 U.S. at 338 (abstaining from case seeking to enjoin state contempt procedures); *Pennzoil*, 481 U.S. at 6, 13–14 (abstaining from case seeking to enjoin the execution of a state court judgment).

If a federal court's ruling on a case would lead to extensive or continued oversight or interference with state procedures, then the court must abstain under *Younger*. For example, in *O'Shea*, the court reversed an injunction that would enjoin officials from "depriving others of their constitutional rights in the course of carrying out their judicial duties in the future" because the result would be an "ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." *O'Shea v. Littleton*, 414 U.S. 488, 492–93, 500 (1974). Furthermore, in *Rizzo*, a district court ordered city officials to create and submit plans for improving management of citizen complaints to the court for approval. *Rizzo v. Goode*, 423 U.S. 362, 365 (1976). There, the Supreme Court reversed the order because it "significantly revised the internal procedures of the Philadelphia police department" and represented an "indisputably" sharp limitation on the department's ability to manage its own internal affairs. *Id.* at 379; *see also Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1073 (7th Cir. 2018) (holding that the district court should have abstained because the requested injunction would "impose a significant limit on the state courts and their clerk in managing the state courts' own affairs").

Finally, custody proceedings and family law cases fit within the third *Sprint* category. For example, in *Falco*, a party challenged having to pay for his children's court-appointed counsel during his divorce proceeding. *Falco*, 805 F.3d at 428. The court held that abstention was appropriate, reasoning that the state's power to issue orders for the "selection and compensation of court-appointed counsel for children [is] integral to the State court's ability to perform its

judicial function in divorce and custody proceedings." *Id.* Additionally, the court in *Silver* determined that *Younger* abstention was appropriate where, after losing a custody battle, a mother and her attorney sought injunctive relief against the state court. *Silver v. Ct. Com. Pl.*, 802 F. App'x 55, 56–57 (3d Cir. 2020). There, the court held that the third category of *Sprint* clearly applied because the state court's order sought "to preserve the state court's power to further one of its uniquely judicial functions – promoting and protecting the best interests of a child . . . ." *Id.* at 58.

In this case, adoption proceedings fall within the third *Sprint* category because they are in furtherance of a state court's ability to perform its judicial functions.

The federal courts' interference in K.Z.'s adoption would unduly interfere with Arcadian state courts' ability to carry out their legitimate judicial activities. Arcadia's ability to create and carry out its own adoption procedures is connected to its ability to administer its own judicial system. It is thus comparable to the interest at stake in *Juidice*, where the Court found abstention necessary to avoid interfering with the state's ability to enforce its contempt procedures. Arcadia's interest in its adoption procedures is also similar to the state's interest in enforcing its judgments in *Pennzoil*, where the Court determined that allowing a federal injunction would impede the state's process for obtaining those judgments in the first place. Here, Plaintiffs' case, should it be allowed to continue, would similarly impede Arcadian courts' ability to move forward with adoption proceedings. Furthermore, Plaintiffs' federal lawsuit is comparable to that at issue in *Falco*, where abstention was warranted to avoid interfering with state courts' management of divorce and custody proceedings. Because the present lawsuit similarly implicates the way in which state courts manage adoption proceedings, this case should not be permitted to continue in federal court. On the other hand, adoption procedures are dissimilar

from the utility board order in *Sprint* because in this case, the federal courts' interference with state courts' adoption procedures would clearly "touch on" their ability to carry out adoptions.

The Court should abstain from hearing this case because it implicates Arcadian court procedures. Plaintiffs' lawsuit attacks the state court's methods of determining adoption criteria. This is dissimilar from the plaintiff's claim in *Cook*, which focused on the constitutionality of a statute rather than a court's procedures. The focus of Plaintiffs' federal lawsuit is also unlike that in *Malhan*, where the plaintiff sought relief regarding his child support payments. The court in that case held *Younger* inapplicable because the suit focused on the "output" of the court's procedures, rather than the procedures themselves. *Malhan*, 938 F.3d at 463. Here, however, Plaintiffs' case focuses on the state court's procedure for evaluating adoption candidates. It is worth noting at this juncture that the district court in the present case distinguished *Juidice* and *Pennzoil* from this case because they dealt with the methods state courts use to enforce final orders. (R. 17.) However, in both of those cases, the Supreme Court focused on the fact that the cases implicated the *methods* of a court's activity, not the finality of the methods targeted. For this reason, the district court erred in distinguishing *Juidice* and *Pennzoil* when their reasoning should have instead confirmed that abstention is appropriate in this case.

Additionally, federal court interference in Arcadia's adoption procedures would result in continued and extensive interference with those procedures. In this case, if the court decided to enjoin Arcadian courts' existing adoption procedures or require that those procedures be updated in accordance with a federal court's ruling, the result would be continuous federal oversight of state court procedures. This outcome would reflect the exact situation in *O'Shea* that the Supreme Court determined could not stand, and therefore abstention in this case is appropriate. Furthermore, should the federal courts weigh in on Arcadia's adoption procedures, the outcome

would also be unacceptable under *Rizzo*, where the Court held that abstention was necessary to prohibit federal courts from revising the internal procedures of a police department. In this case, Plaintiffs encourage this Court to similarly revise Arcadian courts' internal procedures for adoption proceedings. Finally, the facts of this case are also similar to those in *Courthouse News Service*, where the plaintiff hoped to change clerks' processes for releasing complaints to the public. There, the Seventh Circuit held that abstention was necessary to avoid constricting courts and clerks in their capacity to manage their own affairs; it follows that here, abstention is appropriate to avoid limiting courts' ability to manage adoption procedures.

Finally, family law cases fall under the third *Sprint* category. For example, the Second Circuit abstained under *Younger* after finding that appointing counsel to children was crucial to a state court's ability to perform its judicial function regarding custody and divorce proceedings. *Falco*, 805 F.3d at 428. Here, it follows that evaluating adoption requirements would fulfill a comparable state activity. Similarly, the Third Circuit identified promoting and protecting a child's best interests as a "uniquely judicial function," *Silver*, 802 F. App'x at 56–57, and the Arcadian state court's role in protecting K.Z.'s interests therefore fits within that court's judicial function and satisfies *Sprint*.

Because K.Z.'s adoption proceeding falls within *Sprint's* third category, this brief next evaluates the elements test created in *Middlesex*.